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In the Supreme Court

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United States

Supreme Court, U. S.
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OCTOBER TERM, 1940

No. 41

C. E. STEVENS COMPANY (a corporation), C. E. STEVENS TACOMA COMPANY (a corporation), and C. E. STEVENS COMPANY OF OREGON (a corporation),

Petitioners,

vs.

FOSTER & KLEISER CO. (a corporation), GEORGE W. KLEISER, WALTER P. FOSTER, AUGUST F. LAUSEN, JR., ALBERT MORTENSON, GILMAN HAYNES, RESTOP REALTY CO. (a corporation), GERALD O'NEIL, LYLE ABRAHAMSON, PAUL DUEBER, WALTER STEVENS and GEORGE SMITH,

Respondents.

BRIEF FOR RESPONDENTS.

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Subject Index

	Page
Opinions of the Courts Below	2
The Jurisdiction of This Court	2
Statement of the Case	2
Summary of the Complaint	4
The parties	4
Relationship of the billboard business to interstate commerce	5
Formation of the conspiracy	8
The means by which the conspiracy was to be effected	8
Overt acts in furtherance of conspiracy	9
Damages	11
Argument	11
Summary	11
Point One.	
The outdoor advertising or billposting business described in the complaint is not interstate commerce, nor are posting or advertising contracts interstate transactions, and, therefore, a monopoly of the billposting business described in the complaint is not per se a violation of the Sherman Act	15
Misleading statements in petitioners' brief concerning the nature of the billposting business as described in the complaint	16
Conclusions of the pleader that the billposting business is interstate commerce must be disregarded	17
Ramsay Co. v. Bill Posters Assn. distinguished	18
General nature of the billboard business	21
Posters produced in other states are used by billboard operators	23
The posting contracts are not interstate transactions, nor are they agreements for the shipment of posters in interstate commerce	24
The circumstance that billposters solicit posting contracts does not place them in interstate commerce	34

Page

This court has held the billboard business to be essentially local 37

The scope of the Sherman Act was not expanded by the Wagner Act or by this court's decisions under the Wagner Act 37

A monopoly of the billboard business could affect commerce in only two ways: (1) reduce the opportunities of competitors to advertise goods sold in commerce; (2) reduce the opportunities of competitors to use posters produced in other states..... 48

A monopoly of the billboard business does not produce the same type of effect upon interstate commerce as was involved in the Labor Board cases..... 51

The interstate business of advertisers is unaffected by competitive conditions in the billboard business..... 53

The interstate business of the producers of posters is unaffected by monopoly of the billboard business... 54

In any event, a monopoly which has no greater effect upon interstate commerce than to reduce the opportunities of others engaged in local operations to use goods produced in other states, does not directly restrain interstate commerce and is not prohibited by the Sherman Act 55

The court below was correct in its opinion that the complaint shows no intent or purpose to place unlawful restraints upon interstate commerce..... 59

Point Two.

Even if the complaint aptly alleges an unlawful conspiracy to control the shipment of posters in interstate commerce, nevertheless no facts are stated showing that petitioners or their customers were unable to obtain posters, or that petitioners were in any way damaged by any acts in furtherance of the alleged conspiracy..... 62

Point Three.

Assuming arguendo that the Sherman Act was violated by respondents' alleged conspiracy to control advertising agencies and sources of national business, nevertheless the complaint states no facts showing that petitioners

Page

suffered damage by any act in furtherance of the alleged conspiracy to control the sources of national business 74

The national solicitors 81

Petitioners can base no recovery upon association activities 82

Point Four.

Damages caused by local predatory acts are not recoverable because such acts were in no way related to the alleged conspiracy to restrain trade in posters..... 87

Point Five.

In any event the Circuit Court of Appeals was correct in affirming the District Court's dismissal of the second and third counts of the complai 90

No facts are stated supporting any claim that plaintiffs in second and third counts were damaged in their separate corporate capacity..... 93

The cause of action cannot be split between the parent company and its agents, the two subsidiaries..... 94

Conclusion 97

Table of Cases

Pages

Addyston Pipe & Steel Co. v. U. S. (1899), 175 U. S. 211 . . . 38
Apex Hosiery Co. v. Leader, 310 U. S. 473, 60 S. Ct. 982, 84 L. Ed. 913 . . . 42, 44, 47, 52
Apex Hosiery Co. v. Leader, 90 F. (2d) 155 . . . 44
Apex Hosiery Co. v. Leader, 108 F. (2d) 71 . . . 44, 47
Atlantic Cleaners & Dyers v. U. S., 286 U. S. 427, 76 L. Ed. 1204, 52 S. Ct. 607 . . . 47

Bausch Mach. Tool Co. v. Aluminum Co. of America, 2 Cir. (1935), 79 F. (2d) 217 . . . 38n
Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn. (1927), 274 U. S. 37, 47 S. Ct. 522, 71 L. Ed. 916 . . . 41, 61, 62
Birrell, Geo., Inc. v. Fidelity & Casualty Co. (1922), 193 Iowa 860, 188 N. W. 26 . . . 38n
Blumenstock Bros. Adv. Agency v. Curtis Publishing Company, 252 U. S. 436 . . . 12, 29, 31, 33, 41, 43, 53, 54, 56

Chatfield v. Clark, 51 S. E. 743 (1905), 123 Ga. 867 . . . 96
Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 . . . 45, 52
Coronado Coal Company v. United Mine Workers of America (1925), 268 U. S. 295, 45 S. Ct. 551, 69 L. Ed. 963 . . . 41, 42, 47, 61, 62
Crowe Coal Co. v. Labor Board, 308 U. S. 584 . . . 45

Denman v. Richardson, 284 Fed. 592 (1921) (D. C. W. D. Washington S. D.) . . . 96

Ebeling v. Foster & Kleiser Co., 12 F. Supp. 489, D. C. W. D., Wash., N. D., 1935 . . . 71
Edison Co. v. Labor Board, 305 U. S. 197 . . . 45, 52
Ewing-Von Allmen Dairy Co. v. C. and C. Ice Cream Co. Inc. (1940), 109 F. (2d) 898 . . . 57

Farmer's Guide Company v. Prairie Company (1934), 293 U. S. 268 . . . 22
Federal Club v. National League, 259 U. S. 200 . . . 39, 41, 43
Field v. Barber Asphalt Paving Co., 194 U. S. 618 . . . 38
Foster & Kleiser Co. v. Special Site Sign Co., 9 Cir., 85 F. (2d) 742 . . . 78, 82, 89

Pages

Ft. Smith Lumber Co. v. Shackleford, 171 S. W. 99, 115 Ark. 272 (1914) 92

Galveston H. & S. A. Ry. Co. v. Stockton, 38 S. W. 647 (1897) (Tex. Civ. App.) 96

General Outdoor Advertising Company v. Department of Public Works (1935), 193 N. E. 799, 289 Mass. 149 37

Gerli v. Silk Ass'n of America, 36 F. (2d) 959, (Dist. Ct. S. D. New York) 73

Glenn Coal Co. v. Dickinson Fuel Co. (1934), 72 Fed. (2d) 885 18

Hopkins v. U. S., 171 U. S. 578 ..... 41, 43

Industrial Ass'n of S. F. v. U. S. (1924), 268 U. S. 64 ..... 41, 47, 56, 88

Johnson v. Steele, 59 Pac. (2d) 237 (Ore. 1936) 28

Labor Board v. Fainblatt, 306 U. S. 601 45

Labor Board v. Jones & Laughlin, 301 U. S. 1 45

Levering & G. Co. v. Morrin (1933), 289 U. S. 103 ..39, 41, 42, 88

Local 167 v. United States, 291 U. S. 293 41

Loewe v. Lawlor (1908), 208 U. S. 274, 28 S. Ct. 301, 52 L. Ed. 488 ..... 41, 61

Milburn, Alexander, Co. v. Union Carbide and Carbon Corp., 4th Cir. (1926), 15 Fed. (2d) 678 ..... 18, 72

Moore v. New York Cotton Exchange, 270 U. S. 593 ..... 28, 29, 41, 43

Murphy v. Mitchell, 249 Fed. 499, D. C. N. D. N. Y., 1918 .. 67

National Labor Relations Board v. Crowe Coal Co., 104 F. (2d) 633 (8th Cir.) .(certiorari denied—Crowe Coal Co. v. Labor Board, 308 U. S. 584, 60 S. Ct. 107, 84 L. Ed. 86 45

Pacific Railways Advertising Co. v. Conrad (1914), 168 Cal. 91, 141 Pac. 916 32

Packer Corporation v. Utah (1932), 285 U. S. 105, 52 S. Ct. 273, 76 L. Ed. 643 37

Ramsay Co. v. Bill Posters Assn. (1923), 260 U. S. 501, 67 L. Ed. 368, 43 S. Ct. 167 ..... 13, 18, 19, 20, 34, 36, 37, 63

Ryland v. Hollinger, et al., 8 Cir., 117 Fed. 216 (1902) 27, 28

Pages

Santa Cruz Fruit Pack. Co. v. National Labor Relations Board, 303 U. S. 453, 58 S. Ct. 656, 82 L. Ed. 954.....45, 50
Schechter Corp. v. United States (1935), 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570.....39, 57, 61
Shurtz v. Foster & Kleiser Company, et al., 29 F. Supp. 162, D. C. N. D. Calif. 17, 70
Sternberg v. Wakonda Drainage and Levee District, 7 Cir., 33 Fed. (2d) 451 (1929)..... 27
Stevens v. Foster & Kleiser Co., 9 Cir., 109 F. (2d) 764 (1940) 2

United Leather Workers v. Herkert, 265 U. S. 457.....41, 42, 88
United Mine Workers v. Coronado Coal Co. (1922), 259 U. S. 344 .....41, 88
U. S. v. Patten, 226 U. S. 525..... 38

Wannamaker v. Edisto Nat. Bank of Orangeburg, 4 Cir., 62 Fed. (2d) 696 (1933)..... 27
Ware Kramer Tobacco Co. v. American Tobacco Co. et al., 178 Fed. 117, C. C. E. D. N. C. (1910)..... 38n
Ware & Leland v. Mobile County, 209 U. S. 405.....29, 31
Wiloil Corporation v. Pennsylvania, 294 U. S. 169..... 30
Witherell & Dobbins Co. v. United Shoe Machinery Co., 1st Cir. (1920), 267 Fed. 950..... 18

Text Books and Statutes Cited

Text Books

	Pages
2 C. J. S. 138	93
39 Columbia Law Review, 1247	44n
49 Corpus Juris 61-62	67
49 Corpus Juris 99	27
49 Corpus Juris 119	28
51 Harvard Law Review, 169	44n
15 New York University Law Quarterly Review, 135	44n
Webster's New International Dictionary	92
49 Yale Law Journal, 518	44n

Statutes

Federal Rules of Civil Procedure:	
Rule 9(b)	59, 60
Rule 17 (a)	96
Judicial Code, Section 240(a) (43 Stat. 938, 28 U. S. C. A. Section 347(a))	2
Remington's Revised Statutes of Washington, Sections 159 (2) and 165	78, 82
Remington's Revised Statutes of Washington, Section 179	95
Remington's Revised Statutes of Washington, Section 3221	91
Sherman Act, Section 7 (July 2, 1890, Chap. 647, 26 Stat. 210, U. S. C., Title 15, Section 15)	3, 18, 31, 48
15 U. S. C. A. 16, Oct. 15, 1914, c. 323, sec. 5, 38 Stat. 731	38n
Wagner Labor Act, Section 1; Act of July 5, 1935, c. 372, 49 Stat. 449-457; 29 U. S. Code, Sections 151-166, Public No. 198, 74th Congress	46

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Respondents.

BRIEF FOR RESPONDENTS.

OPINIONS OF THE COURTS BELOW.[1]

The opinion of the Circuit Court of Appeals for the Ninth Circuit, to which court a writ of certiorari has been directed, is officially reported in 109 F. (2d) 764, and appears in the Record at pp. 81-97.

The opinion of the District Court for the Western District of Washington, Northern Division, sustaining respondents' demurrer to petitioners' second amended complaint is not officially reported. It is embodied in a letter to counsel for the respective parties, and appears in the Record at pp. 54 and 55.

THE JURISDICTION OF THIS COURT.

Petitioners have invoked the jurisdiction of this court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (43 Stat. 938, 28 U.S.C.A. Sec. 347(a).)

This court granted a writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit, on May 6, 1940.

STATEMENT OF THE CASE.

This brief is submitted on behalf of the four respondents upon whom service of process was made, namely, Foster and Kleiser Company (sued herein as "Foster & Kleiser Co."), a corporation, George

1. Unless otherwise stated, emphasis has been supplied by the writers of this brief.

W. Kleiser, Restop Realty Company, a corporation, and Gerald O'Neil.

The statement of the petitioners contains inaccuracies and omissions, particularly with reference to the relationship of the billboard business[2] to interstate commerce. We therefore here set out a statement of the case which will serve to correct the more outstanding inaccuracies and omissions.

This action was brought by petitioners (plaintiffs below) under Section 7 of the Sherman Act (July 2, 1890, Chap. 647, 26 Stat. 210, U.S.C., Title 15, Sec. 15) praying for treble damages claimed to have been caused by an alleged conspiracy of the respondents (defendants below) to monopolize the outdoor advertising business on the Pacific Coast.

The action was filed in the District Court of the United States for the Western District of Washington, Northern Division, on February 27, 1933. While the case was pending there, the petitioners filed an original and two amended complaints, all of which the District Court held to be bad for one reason or another. On April 26, 1939, the District Court entered a judgment of dismissal after sustaining respondents' demurrer to petitioners' second amended complaint. (R. 54-55.) Petitioners thereupon appealed to the Circuit Court of Appeals for the Ninth Circuit, which affirmed the judgment of dismissal on February 19, 1940. (R. 111.)

2. Called in the second amended complaint and in the petition and briefs of petitioners the "outdoor advertising business."

On May 6, 1940, this court granted a petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. (R. 114.)

SUMMARY OF THE COMPLAINT.

For the convenience of the court we shall refer to petitioners' second amended complaint as "the complaint".

The complaint is framed in three counts, the first (R. 3-45) on behalf of C. E. Stevens Company, the second (R. 45-47) on behalf of C. E. Stevens Tacoma Company, and the third (R. 47-49) on behalf of C. E. Stevens Company of Oregon. Stripped of argument and conclusions of law the complaint states the following facts:

The Parties.

Petitioners are three corporations engaged in the billboard business in the states of Washington and Oregon. Petitioner C. E. Stevens Company (plaintiff in the first count) is alleged to be the "parent company", and the other two petitioners (plaintiffs in the second and third counts respectively) are alleged to be "subsidiaries of the parent company, functioning principally as branch offices of the parent company."[3] (R. 3-4.)

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3. It is to be noted that in this connection it is also alleged (R. 4) "that all business activities relating to the C. E. Stevens Tacoma Company and C. E. Stevens Company of Oregon are directed through the C. E. Stevens Company".

The defendants[4] are Foster and Kleiser Company; four of its officers and employees (George W. Kleiser, President; Walter P. Foster, Vice-President; Albert Mortenson, Treasurer; Gilman Haynes, Lease Manager); Restop Realty Company, and its Washington statutory agent, Gerald E. O'Neil.

The respondent Foster and Kleiser Company is a Nevada corporation engaged in the billboard business in the states of Washington, Oregon, California and Arizona, and other states of the United States. (R. 6.) Foster and Kleiser Company has its principal place of business in the City of San Francisco, and branch offices throughout the Pacific Coast, and, in addition, has branch offices in Chicago, Illinois, and New York City. (R. 8.)

The respondent Restop Realty Company is in the business of owning, holding and leasing real property and outdoor advertising, that is billboard, sites in the Pacific Coast states of Oregon, Washington, California and Arizona. More than 50% of its voting stock is owned and controlled by respondent Foster and Kleiser Company, and its officers and directors. (R. 9.)

Relationship of the Billboard Business to Interstate Commerce.

The parties are engaged in the business of soliciting, entering into and performing[5] poster advertis-

4. As already stated, process was served on only four of the defendants, viz.: Foster and Kleiser Company, George W. Kleiser, Restop Realty Company, and Gerald O'Neil.

5. The word used in the complaint is "execution", but the pleader must have meant "performing".

ing contracts, painted bulletin display contracts, painted wall display contracts, and commercial sign contracts from advertisers, representatives of advertisers, or advertising agencies located in various states of the United States. (R. 4, 6.) The materials used in the billposting business are sold by lithographers who are located in states other than the Pacific Coast area, principally in Kentucky, Ohio and Illinois. (R. 10, 11.) For the most part, advertisers are located in states other than those comprising the Pacific Coast area. (R. 11.) Therefore, both petitioners and respondents, in the course of the billposting business, enter into a substantial number of posting contracts with persons located in other states, and a substantial number of the posters which are used in performing the contracts originate in states other than those comprising the Pacific Coast area, and have traversed state lines before they are posted on billboards in the Pacific Coast area.

The posting of a bill or poster upon a billboard *involves three different parties and two different transactions.* Usually the advertiser either directly or through his agency, contracts with the lithographer who makes the posters for the making of all the posters that the advertiser desires to use. (R. 17.) The advertiser then contracts with the plant owners, such as petitioners and respondent Foster and Kleiser Company, to place these posters upon a stated number of billboards. (R. 17.) The advertiser then directs[6]

6. The language of the averment is, "The advertiser then may either direct the lithographer to forward the posters to the various plants or may have the lithographer deliver them to his or its representatives, and have them forwarded to the plants."

the lithographer to forward the posters to the billposter, or has the lithographer deliver the posters to the advertiser's representative, who in turn forwards them to the billposter. (R. 17.) It will be seen from the foregoing that the shipment of posters in interstate commerce occurs upon the direction of the advertiser, and that the billposter has nothing whatsoever to do with the shipment of posters in interstate commerce. (R. 17.) We have not overlooked other allegations in the complaint to the effect that the posting contracts are agreements between the parties to ship posters in interstate commerce (R. 4); but we shall show in our argument later in the brief[7] that the specific allegations of the complaint allege (1) the contract between the advertiser and the billposter is an agreement for the display of posters on billboards; (2) the contract for the manufacture of the posters is a *different transaction* and is between the advertiser and the lithographer; and (3) the shipment of the posters is a *third and still different transaction* which occurs upon the direction of the advertiser to the lithographer,—all demonstrate affirmatively that the posting contract is merely an agreement for the local display of posters and that the shipment of the posters is a different transaction in which the billposter does not participate. These specific allegations of the complaint control and neutralize the inconsistent allegations elsewhere in the complaint (R. 4-8, 10-12) that the posting contract is an agreement for the interstate shipment of posters.

7. Brief, pp. 24-28.

Formation of the Conspiracy.

In the year 1915 respondent Foster and Kleiser Company and certain persons, unknown to petitioners, are alleged to have entered into a conspiracy. (R. 18-19.) The purpose of this conspiracy was "* * * to attempt to monopolize * * * in the Pacific Coast Area all branches of the outdoor advertising business * * * and particularly to prevent plaintiff * * * from engaging in the posting business, from securing and executing contracts for national posting business, from securing posters with which to conduct either national or local posting business; to prevent lithographers from supplying posters either to independent plant owners or advertisers who were customers of independent plant owners; and to prevent independent plant owners from securing adequate, sufficient or proper plant facilities whereby said independent plant owners could furnish a satisfactory advertising service to advertisers." (R. 19.) It is to be noted that petitioner C. E. Stevens Company (plaintiff in the first count) was not in existence prior to March 8, 1924 (R. 3),[8] and that neither of the other two petitioners was in existence prior to June 1, 1928. (R. 45, 47.)[9] Therefore, the allegation that the conspiracy

8. In the first sentence of the first count of the second amended complaint it is alleged (R. 3), "That plaintiff, C. E. Stevens Company, is now, and ever since March 8, 1924, and at all times herein mentioned has been, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Washington, * * *."

9. In the first sentence of the second count of said complaint it is alleged (R. 45), "That plaintiff, C. E. Stevens Tacoma Company is now, and ever since about June 1, 1928, and at all times herein mentioned, has been a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Washington * * * That ever since June 1, 1928 plaintiff has been engaged in the business of outdoor advertising * * *."

In the first sentence of the third count of said complaint it is alleged (R. 47), "That C. E. Stevens Company of Oregon is now, and ever since

was particularly directed against petitioners must be disregarded because none of the petitioners was in existence in 1915 when the conspiracy is alleged to have been formed, and none of them came into existence for many years thereafter.

The Means by Which the Conspiracy Was to be Effected.

The means by which this conspiracy to monopolize the billposting business was to be effected are alleged to be:

> Control of advertising agencies and agencies selling national outdoor advertising. (R. 20.)
>
> Prevention of the shipment of posters in interstate commerce to independent plants. (R. 20.)
>
> Prevention of the sale of posters to advertisers displaying advertisements on independent bill poster plants. (R. 20.)
>
> Preventing plaintiff and other independents from securing plant facilities with which to secure posting contracts. (R. 20.)

Overt Acts in Furtherance of Conspiracy.

The overt acts which are alleged to have been committed in furtherance of the conspiracy fall into three general classes:

(1) Threats to refuse to post lithographs and posters, and actual refusal to post posters if litho-

about June 1, 1928, and at all times herein mentioned has been a corporation duly incorporated, organized and existing under and virtue of the laws of the State of Oregon, * * *; that ever since June 1, 1928, plaintiff company has been engaged in outdoor advertising * * *."

graphers or advertisers dealt with independent plants. (R. 23-24.)

These threats are not claimed to have been made by the conspirators themselves but rather "by and through" a trade association of which respondent Foster and Kleiser Company was a member. It is said that these threats and refusals resulted in a general obstruction to the business of independents. (R. 23, 24, 26.)

(2) An attempt is made to set forth the commission of overt acts in furtherance of an alleged conspiracy to control advertising agencies and other sources of national outdoor advertising. The allegations in support of this claim are both voluminous and extremely indefinite. By way of conclusion it is claimed that respondent Foster and Kleiser Company secured a monopoly of national outdoor advertising contracts by controlling advertising agencies and other sources of national business.

Later in this brief[10] we shall show that the complaint states no facts showing that the conspirators ever did control advertising agencies or other sources of national business, and, further, that the complaint states no facts showing that petitioners sustained damage by any act in furtherance of the alleged conspiracy to control national advertising at its source.

(3) So-called local predatory acts designed to prevent competitors of Foster and Kleiser Company

10. Brief, pp. 74-87.

from securing billboard locations, or from using billboard locations after they had been secured. (R. 36-44.)

Damages.

It is claimed by way of general conclusion, that petitioner C. E. Stevens Company was damaged in the amount of $350,000.00 (R. 45), C. E. Stevens Tacoma Company in the amount of $50,000.00 (R. 47) and C. E. Stevens Company of Oregon in the amount of $100,000.00. (R. 48.) The total claim, trebled, is for $1,500,000.00.

ARGUMENT.

Summary.

The billboard business consists of pasting and painting advertisements on billboards and is therefore an intrastate business. The billposter makes no shipments in interstate commerce. He uses posters produced in other states but has nothing to do with the shipment of the posters, as the posters are usually purchased by the advertiser and are shipped to the billposter upon the advertiser's direction.

A monopoly of the billposting business does not *per se* violate the Sherman Act because a monopoly of the business does not directly restrain interstate commerce, notwithstanding that billboard advertising is used to promote the interstate sale of goods, and that the billposter uses posters produced in other states.

The interstate commerce of the advertiser does not depend in any way upon, nor is it directly affected by, competitive conditions in the billboard industry. *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U.S. 436. Nor is the interstate business of the producer of posters directly affected by local competitive conditions in the billboard industry. The posters are produced and sold and shipped in interstate commerce regardless of which competitor in a particular locality secures the posting contract. The poster is usually purchased by the advertiser (R. 17) and the lithographer is not concerned with which one of several billposters the advertiser contracts for the local display of the poster. The destination of the posters in a particular locality will vary slightly depending upon which competitor secures the contract, but even this slight effect occurs not because of any direct control of respondents over the interstate shipment of the posters but rather beause local events have reduced the opportunity of one competitor or another to use posters. The interstate business of the eastern producer of posters is therefore entirely unaffected by the distant local competitive events in the Pacific Coast area and any variation in the normal interstate channel of posters is not only slight but is the indirect result of local events which have reduced the opportunity of competitors to use such posters locally. There is nothing in the Labor Board decisions of this court which would require a holding that a monopoly of the billboard business is *per se* in violation of the Sherman Act.

The court below correctly decided that the local acts complained of did not directly restrain commerce. However, if the acts had been committed for the purpose of interfering with interstate commerce they would have been in direct violation of the Sherman Act, even if, when separately considered, such acts did not directly restrain interstate commerce. The majority opinion below made its observations concerning the intent of the conspirators in order to demonstrate that the acts of the conspirators not only failed to restrain interstate commerce directly but were not performed with any purpose to interfere with that commerce.

A monopoly of the billboard business not being *per se* a violation of the Sherman Act, the remaining question is whether the means used to accomplish the monopoly bring the alleged acts of the conspirators within the scope of the statute.

The first means which the conspirators planned to use was to prevent competitors and their customers from securing posters in interstate commerce. (R. 19-20.) Although such means, if employed, would be in violation of the Sherman Act (*Ramsay Co. v. Bill Posters Assn.*, 260 U.S. 501), no facts are stated showing that petitioners or their customers were unable to obtain posters or that petitioners were in any way damaged by any acts in furtherance of this phase of the conspiracy.

The second means agreed upon was to control advertising agencies and other sources of national busi-

ness. (R. 20.) The complaint fails to show that this control was secured, that any acts were performed which would have had the effect of securing such control or that the petitioners suffered any damage by any acts done in furtherance of this phase of the alleged conspiracy.

The third means agreed upon was the commission of local predatory acts designed to prevent competitors from offering adequate posting facilities to advertisers. These local acts had no direct effect upon the interstate shipment of posters, for the reasons heretofore stated. The acts themselves were in no way related to the furtherance of the alleged conspiracy to restrain interstate commerce in posters or lithographs, for the performance of such acts would not result in a direct restraint of interstate commerce in posters or lithographs. Damages caused by acts which have no reasonable relation to a furtherance of the alleged conspiracy to place unlawful restraints on the interstate shipment of posters and lithographs are not recoverable.

The complaint affirmatively shows that the petitioners named in the second and third counts acted only in the capacity of agents or branches of the petitioner named in the first count. The petitioners in the second and third counts, therefore, have no right to join with the principal petitioner named in the first count in prosecuting this action as no damage is alleged except as to the business and property of C. E. Stevens Company (petitioner in the first count) for

whom they are alleged to have acted as agents. No facts are stated showing that petitioners in the second and third counts were damaged in their separate corporate capacity. Although this point is not raised in the petition for certiorari and was not decided by the Circuit Court of Appeals, nevertheless it was urged in the District Court, was briefed in the Circuit Court of Appeals, and is involved in the demurrers to the second and third counts. Respondents rely upon this point, in addition to those previously stated, as a further reason why the Circuit Court of Appeals was correct in affirming the District Court's dismissal of the second and third counts.

POINT ONE.

THE OUTDOOR ADVERTISING OR BILLPOSTING BUSINESS DESCRIBED IN THE COMPLAINT IS NOT INTERSTATE COMMERCE, NOR ARE POSTING OR ADVERTISING CONTRACTS INTERSTATE TRANSACTIONS, AND, THEREFORE, A MONOPOLY OF THE BILLPOSTING BUSINESS DESCRIBED IN THE COMPLAINT IS NOT PER SE A VIOLATION OF THE SHERMAN ACT.

The basic assumption of the complaint is that the billposting business as a whole must be considered as interstate commerce and that as a consequence a monopoly of the business is a violation of the Sherman Act. To support this untenable position, petitioners have dressed up their complaint with conclusions of law to the effect that the billposting business is interstate commerce. In addition, petitioners have misleadingly stated the facts in their brief and it may erro-

neously appear therefrom that the parties conduct an interstate business.

Misleading Statements in Petitioners' Brief Concerning the Nature of the Billposting Business as Described in the Complaint.

We deal first with the misleading statements in petitioners' brief concerning the claimed interstate character of the billposting business. It is said, at page 7 of their brief,[11] that Foster and Kleiser Company shipped posters from one state to another, and also designs and stencils for use in preparing painted displays on billboards. There is no allegation in the complaint to support such statements. At page 17 of their brief it is said[12] that an essential part of petitioners' business involves arranging for the interstate shipment of posters. There is no allegation in the complaint to support this statement. Other statements may be found at page 20 of petitioners' brief, where it is said[13] that

11. It is stated in the brief: "The outdoor advertising business of the petitioners and respondents is operated on a national scale. Foster & Kleiser Co. not only posted the posters and lithographs upon its billboards after they had been delivered to a town for that purpose but, throughout the country, it directly solicited and executed contracts for such services. As part of such contracts, it procured the necessary posters and lithographs for its patrons and shipped them from one state to another. Such interstate shipment was for the primary purpose of posting them on specified billboards supplied by respondents under the terms of the contracts. The same may be said as to the designs and stencils shipped by or to repondents for use in preparing painted displays upon their boards. Foster & Kleiser Co. is a national concern engaged in a nationwide business (R. 6-8)."

12. It is stated in the brief: "An essential part of petitioners' business involved arranging for the interstate shipment of posters, lithographs, paint designs and stencils, and receiving and displaying them."

13. At pages 19 and 20 of petitioners' brief, it is said: "It is obvious that the conspirators realized the most effective method of accomplishing their monopoly of the outdoor advertising business and the acquisition of the power to fix unreasonable prices in such business was to gather to themselves all the national contracts which, *per se*, entailed the shipment of posters and lithographs from one state to another."

national advertising contracts *per se* involve the interstate shipment of posters, and at page 29 of their brief, where it is said[14] that posting contracts contemplate the interstate shipment of posters.

Conclusions of the Pleader that the Billposting Business is Interstate Commerce Must be Disregarded.

The complaint is replete with conclusions of law to the effect that the billposting business is interstate commerce. In the very first paragraph of the complaint (R. 3), petitioners allege that they are engaged in interstate commerce. This conclusion is repeated again and again, and in paragraph after pargraph, with such frequency that it is difficult to cull the facts from the conclusions and the pleader argument. Little wonder that the district judge in his opinion (R. 54) stated:

> "that the Second Amended Complaint stripped of pleader argument and conclusion does not sufficiently state facts or factual basis for the alleged direct interstate interference by any of the defendants with plaintiffs' outdoor advertising business,";

or that District Judge St. Sure, in passing upon an identical complaint in the case of *Shurtz v. Foster and Kleiser Company*, 29 Fed. Supp. 162, stated, at page 163:

14. At page 29 of petitioners' brief it is said: "The contracts contemplate and the parties to this suit actuate the shipment of posters, lithographs, designs and stencils from third persons in other states to their 'plants' in the Pacific Coast Area in fulfillment of the contracts (R. 4-12)."

"Plaintiff's complaint is almost wholly devoted to an argumentative statement of his theory of the case, the history of outdoor advertising, and is replete with conclusions of law."

Conclusions of law respecting interstate commerce must be disregarded by the court in determining the sufficiency of the complaint.

Glenn Coal Co. v. Dickinson Fuel Co. (1934), 72 Fed. (2d) 885, at p. 888;

Alexander Milburn Co. v. Union Carbide and Carbon Corp., 4th Cir. (1926), 15 Fed. (2d) 678, at p. 680;

Witherell & Dobbins Co. v. United Shoe Machinery Co., 1st Cir. (1920), 267 Fed. 950, at pp. 955, 956.

Ramsay Co. v. Bill Posters Assn. Distinguished.

The *Ramsay* case (*Ramsay Co. v. Bill Posters Assn.* (1923), 260 U. S. 501, 67 L. Ed. 368, 43 S. Ct. 167), is relied upon by petitioners, at page 46 of their brief, as authority for the proposition that the billposting business is interstate commerce. Because the *Ramsay* case is a decision of this court dealing with the general subject of unlawful restraints upon the interstate shipment of posters, it is desirable to determine at the outset just what this court actually held in that case.

The *Ramsay* case involved separate actions for treble damages under Section 7 of the Sherman Act, wherein the District Court dismissed the complaints upon demurrer, and this action was affirmed by the Circuit Court of Appeals on the ground that no cause

of action was stated. The cases were brought to this court on writ of error and it was held that the judgment of dismissal should be reversed inasmuch as the complaints stated a cause of action. The plaintiffs were advertising solicitors who prepared, designed, purchased *and sold posters in interstate commerce* and were, therefore, held by this court to be engaged in interstate commerce. (260 U. S. 501, at p. 509.)

The defendant, Bill Posters Association, in the *Ramsay* case was an organization of billposters throughout the United States and Canada. It was alleged in the complaint that the association and its members entered into a conspiracy to control the interstate trade and commerce in posters throughout the United States and Canada; and also that the defendants, by threats to withdraw their patronage, forced manufacturers of posters to refuse to furnish posters to independent billposters or to advertisers desiring to do business with independent billposters except upon prohibitive terms. Thus, this court said, at page 510 of its opinion:

> "* * * By threats of withdrawal of patronage, manufacturers have been prevented from furnishing posters to independent billposters or to advertisers desiring to do business with independents except upon prohibitive terms.
>
> "* * * Advertisers are not permitted to purchase 'stock' posters unless willing to have them displayed upon boards of members, *and independent billposters cannot purchase such matter at all.*"

It was clear from the allegations in the *Ramsay* complaint that the action of the conspirators in that case

prevented lithographers from shipping posters to the plaintiff solicitors and that the plaintiffs were thereby prevented from carrying on the business. Furthermore, the plaintiffs were engaged in shipping posters in interstate commerce and were thus engaged in interstate commerce. The immediate and direct effect of the defendant's acts was to destroy the interstate business of the plaintiff solicitors. Thus this court stated, at page 511 of its opinion:

> "* * * As a direct result of the defendants' joint acts, plaintiffs' interstate and foreign business has been greatly limited or destroyed."

Accordingly, this court was of the opinion that the activities of the defendants described in the *Ramsay* complaint imposed a direct and immediate restraint upon and complete control over the interstate movement of posters throughout the United States and Canada.

We shall show in this brief that the parties in the case at bar are not alleged in the complaint to have engaged in the shipment of posters in interstate commerce as was the case with the solicitors in the *Ramsay* case. We shall also show that, disregarding conclusions of law, the respondents in the case at bar are not alleged in the complaint to have placed any direct restraint upon the interstate movement of posters, nor are they alleged to have effected any such control over the interstate movement of posters as was described in the *Ramsay* complaint. In any event petitioners have not alleged, as did the plaintiffs in the *Ramsay* case, that respondents have prevented petitioners from se-

curing posters through the channels of interstate commerce.

General Nature of the Billboard Business.

The complaint in the case at bar shows that the outdoor advertising or billboard business consists of painting and posting advertisements on billboards and soliciting and performing contracts for such painting and posting of advertisements. The posting itself is a local business. The contract for posting is a contract for the performance of a local act and hence is not an interstate transaction. The solicitation, making and performance of such contracts are, therefore, not interstate commerce.

The outdoor advertising or billboard business exists to deliver a local service. The most analogous commercial enterprise that can be suggested for comparison is the office building or apartment house business. Advantageous locations must be secured and when secured a structure (billboard) erected, and then the space on the structure rented. ("Sold" is the word commonly used in this connection.) Since choice locations are scarce the competition for such locations is vigorous. In renting apartment house business—rooms—the owner must compete both as to service and price with other owners. The billboard operator must do the same with respect to the advertising space which he "sells" on his board.

The billboard business differs from other advertising services because the billboard operator does not move his service in commerce as does the publisher of a

newspaper or magazine. What he "sells" is space on a structure as immovable as the earth itself, so far as the concept of trade and commerce is concerned. It differs from other businesses in general in that no matter how greatly it may expand, no matter how many states it may extend into, it neither sells nor ships anything that can move in interstate commerce. The importance of this distinction should be especially observed in the case at bar because Foster and Kleiser Company is engaged in business in the states of Washington, Oregon, California and Arizona, and is alleged to have eastern offices in Chicago and New York City (R. 8), and to control over 90% of the outdoor advertising business, that is billposting business, of the Pacific Coast area. (R. 36.) Here is a business which is carried on extensively throughout the entire Pacific Coast area but yet the very nature of the business is such that it sells and ships nothing in interstate commerce.

In the course of his business the billposter leases or buys a real estate location, erects a billboard, and paints or posts an advertisement thereon. All that he sells is space upon which to display advertisements; and that space does not move. When the period of display is over the advertisement or poster is obliterated. There is nothing for him to move or transfer in order to conduct his business. The publisher, by contrast, moves his advertising service to the reader of his magazine and may do so in interstate commerce. (See and compare *Farmer's Guide Company v. Prairie Company* (1934), 293 U. S. 268.) The billboard operator,

however, fixes his advertisement at one place and if it is seen at all it is only because the reader has moved himself to a position where he can read the fixed advertisement.

Posters Produced in Other States are Used by Billboard Operators.

The billposter, like every person in business, uses many articles which have been produced in other states. Among these articles are advertisements in the form of lithographs or posters which have been manufactured or printed by persons located in states other than those which comprise the Pacific Coast area, principally in the states of Kentucky, Ohio and Illinois. (R. 10-11.) Petitioners place great emphasis on the circumstance that posters and lithographs which are pasted on billboards by the billposters are produced in other states, but they ignore entirely the fact that although the posters may be shipped into the Pacific Coast states for posting, when the posters are received by the billposter in the Pacific Coast states they have left the stream or flow of interstate commerce and they never re-enter it.

Petitioners' argument assumes that because posters are needed by those engaged in the billposting business in order to perform their posting contracts, and because the posters are manufactured principally in the eastern states, the execution or performance of the posting contracts makes the business itself interstate commerce. This conclusion does not follow. A local business does not become interstate in character merely because its conduct puts into action forces which tran-

scend state lines. As we shall presently demonstrate, the complaint affirmatively shows that the billposter has nothing to do with the shipping of posters, but that such shipment is made on direction of the advertiser or the lithographer. There is a hiatus between the transportation and the display of posters, which is not bridged by the circumstance that the transportation is one of the results of the execution of the posting contracts.

The Posting Contracts are Not Interstate Transactions, nor are they Agreements for the Shipment of Posters in Interstate Commerce.

As we have already stated, the pasting of a poster on a billboard is a local transaction and a contract for the performance of this service is not an interstate transaction. In making this statement we do not overlook the allegations contained in paragraphs II and III of the complaint (R. 4-8), wherein it is alleged that the posting contracts which the parties executed are in almost every case agreements to ship posters, stencils, designs and other materials in interstate commerce, that it is within the contemplation of the parties that the posters be painted on specific billboards, that until they are so pasted the posting contract remains incomplete, and that in the execution of such contracts the posters are shipped in interstate commerce.

The allegation that the posting contract remains executory and incomplete until performed is, of course, obvious and adds nothing to the complaint. However, the allegation that the posting contracts are agree-

ments to ship posters, if it be an allegation of fact rather than a conclusion, is so inconsistent with and repugnant to other allegations of the complaint as to be nugatory.

We refer in particular to those allegations of paragraph VI of the complaint, which read as follows:

> "The posting of a bill or poster upon a billboard involves three different parties and two different transactions; usually the advertiser either directly or through his agency contracts with the lithographer for the making of all the posters that the advertiser desires to use. The advertiser then either personally, or through the agency, contracts with the plant owners in the localities which the advertiser desires to reach for the placing of these posters upon a stated number and class of billboards, and, in many cases, upon certain specified billboards. The advertiser then may either direct the lithographer to forward the posters to the various plants or may have the lithographer deliver them to his or its representatives, and have them forwarded to the plants. The lithographer usually is located in a different state from the advertiser who employs him to prepare the posters. Both the advertiser and the lithographer are usually located in different states from the plants upon which the posters are placed." (R. 17-18.)

We refer also to subdivisions (e) and (f) of paragraph VI (R. 16-17), which show that the posting contract solicited by the agencies is a contract "* * * for the display of poster and painted advertising matter * * *", and that such advertising matter is "* * * transported in interstate commerce *in accordance with*

the advertiser's instructions;". In subdivision (f) of paragraph VI (R. 16-17), it is alleged that the advertising agencies which solicit advertising contracts cause the copy and design for painted signs to be transported in interstate commerce "* * * from the office or studio of the advertiser or his agent, to operators of paint plants in various cities and towns * * *."

The foregoing quotations from paragraph VI of the complaint are specific in character and are at complete variance with and repugnant to the general allegations of paragraph III that the posting contracts are agreements for the shipment of posters. Paragraph VI affirmatively and specifically alleges that the contracts are agreements for the display of posters, and that the shipment of posters in commerce is one of the *"different transactions"* which precede the pasting of a poster upon a billboard. Paragraph VI also affirmatively and specifically alleges that the shipment of the poster in interstate commerce *is made by the lithographer pursuant to the direction of the advertiser,* and, by necessary implication, that the billposter has nothing whatsoever to do with the transportation of the poster.

The complaint therefore affirmatively shows, *as is the fact,* that the posting contract is merely an agreement between the billposter and the advertiser to paste or paint advertisements on billboards. The specific statement of the facts alleged in paragraph VI of the complaint relative to transactions which resulted in a movement of posters in interstate commerce of course controls the general, inconsistent and repugnant allegations contained in paragraphs II and III of the

complaint; and, accordingly, there is no appropriate allegation in the complaint that display contracts made by Foster and Kleiser Company required *as an essential or integral part thereof* the shipment of posters or lithographs or any other materials across state lines.

The rule of pleading that specific allegations control inconsistent general allegations is elementary. Inconsistent, repugnant or contradictory averments of matters of substance neutralize each other and render a pleading defective on demurrer.

49 *Corpus Juris*, p. 99;
Ryland v. Hollinger, et al., 8 Cir., 117 Fed. 216 (1902).

At page 219 the court said:

"* * * Again, the whole of the above-quoted allegation is so plainly repugnant to the other allegations of the same pleading that it is nullified. A pleading must be considered as a whole, and construed upon demurrer most strongly against the pleader wherever its allegations are doubtful or inconsistent."

Sternberg v. Wakonda Drainage and Levee District, 7 Cir., 33 Fed. (2d) 451 (1929), at p. 452.

Furthermore, where allegations of a pleading are inconsistent or contradictory, the pleader is bound by those most favorable to his opponent.

Wannamaker v. Edisto Nat. Bank of Orangeburg, 4 Cir., 62 Fed. (2d) 696 (1933).

At page 697 the court said:

"* * * There are certain inconsistencies in the allegations of the bill which have been resolved in

the following summary of the facts in accordance with the rule that, where allegations are contradictory, the pleader is bound by those most favorable to his opponent. 49 C. J. 119."

49 *Corpus Juris,* 119;

Ryland v. Hollinger, supra;

Johnson v. Steele, 59 Pac. (2d) 237, 243 (Ore. 1936).

Although interstate shipments of posters are shown by the complaint to be a frequent result of posting contracts, this circumstance does not render the contracts themselves interstate transactions. If interstate shipments are actually made, it is not because of any contractual obligation to that effect. The most that can be said is that the agreements are likely to give rise to interstate shipments. This is not enough. Petitioners argue that the agreements actuate the shipment of posters from one state to another (Brief, p. 46) and seek by this argument to show that the posting contracts are interstate transactions. The decisions of this court are against the petitioners.

In the case of *Moore v. New York Cotton Exchange,* 270 U. S. 593, there was before this court an alleged violation of the Sherman Act, involving the question whether contracts or agreements for the purchase and sale of cotton for future delivery, or the transactions to which they related, were subjects of interstate commerce because of the fact that they might give rise to interstate shipments. In that case, as in the one at bar, the defendant was engaged in a purely local business. At page 604 this court said: "The New York Exchange is engaged in a local business."

We have already shown that respondent Foster and Kleiser Company was and is engaged in a local business.

> "* * * Transactions between its members", continued the court in the *New York Cotton Exchange* case, "are purely *local in their inception and in their execution.* They consist of agreements made on the spot for the purchase and sale of cotton for future delivery, with a provision that such cotton must be represented by a warehouse receipt issued by a licensed warehouse in the Port of New York, and be deliverable from such warehouse. Such agreements do not provide for, nor does it appear that they contemplate, the shipment of cotton from one state to another. *If interstate shipments are actually made, it is not because of any contractual obligation to that effect; but it is a chance happening which cannot have the effect of converting these purely local agreements or the transactions to which they relate into subjects of interstate commerce. Ware & Leland v. Mobile County,* 209 U. S. 405, 412-413. *The most that can be said is that the agreements are likely to give rise to interstate shipments. This is not enough. Engel v. O'Malley,* 219 U. S. 128, 139. See also *Hopkins v. United States,* 171 U. S. 578, 588, 590; *Anderson v. United States,* 171 U. S. 604, 615, 616."

In *Ware & Leland v. Mobile County,* 209 U. S. 405, which is approvingly cited in *Moore v. New York Cotton Exchange,* supra, and also in the *Blumenstock* case, supra (*Blumenstock Brothers Adv. Agency v. Curtis Publishing Co.,* 252 U. S. 436), this court held that brokers that take orders and send them to other

states for the purchase and sale of grain or cotton on speculation were not engaged in interstate commerce, and that the contracts themselves were not the subjects or instrumentalities of interstate commerce, because such contracts for sale or purchase did not require an interstate shipment. At page 413 the court said:

> "* * * The transaction was thus closed by a contract completed and executed in the foreign State, although the orders were received from another State. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one State to the place of delivery in another State."
>
> * * * * * * *
>
> *"These contracts are not, therefore, the subjects of interstate commerce, any more than in the insurance cases,* where the policies are ordered and delivered in another State than that of the residence and office of the company. The delivery, when one was made, *was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."*

Even assuming that in most instances the posters were actually shipped in interstate commerce to the Pacific Coast area, and assuming that the complaint so charges, nevertheless this circumstance does not render the posting contracts interstate transactions. (See *Wiloil Corporation v. Pennsylvania,* 294 U. S. 169.)

The circumstance that the posting contracts are made between persons residing in different states does not transform the agreement into an interstate transaction.

In *Ware & Leland v. Mobile County,* 209 U. S. 405, at p. 413, the court said:

> *"These contracts are not, therefore, the subjects of interstate commerce, any more than in the insurance cases,* where the policies are ordered and delivered in another State than that of the residence and office of the company. The delivery, when one was made, *was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."*
>
> *Blumenstock Bros. v. Curtis Publishing Company* (1920), 252 U. S. 436.

The *Blumenstock* case was an action under Section 7 of the Sherman Act against Curtis Publishing Company. Plaintiff was an advertising agency which desired to place advertisements with defendant Curtis Publishing Company. The complaint alleged that the publishing company refused to accept advertising from plaintiff unless plaintiff agreed to reduce the amount of advertising given to the owners and publishers of other magazines which were competing with the Curtis Publishing Company. The action of the Curtis Publishing Company was for the purpose of obtaining a monopoly of and control over advertising contracts. The plaintiff was engaged in business in Chicago and its advertisers were located throughout the United

States. Therefore, the contracts were made between persons residing in different states. Nevertheless, this court held that the action of the Curtis Publishing Company in seeking to monopolize such contracts did not constitute a violation of the Sherman Act and it affirmed the judgment of dismissal.

See also *Pacific Railways Advertising Co. v. Conrad* (1914), 168 Cal. 91, 94, 141 Pac. 916.

In the *Pacific Railways* case, the plaintiff advertising company refused to pay a business license fee exacted by a license ordinance of the City of Alameda. The advertising company sought an injunction restraining the chief of police from interfering with its advertising cards which it was displaying on railway cars operated by the Southern Pacific Company, claiming that the ordinance was an unauthorized interference with the interstate commerce which it was carrying on. In affirming the judgment for the city upon a general demurrer, the Supreme Court of California said at page 94:

> "Whatever may be the general nature of plaintiff's business, the particular business for the conduct of which a license fee was here exacted was a business conducted wholly within the state of California, and in no way involved the transportation of goods. *Mere contracts, though executed in several states, are not in and of themselves any part of interstate commerce within the meaning of the federal constitution.* (*Paul v. Virginia,* 8 Wall. 168 (19 L. Ed. 357); *Butler Bros. Shoe Co. v. United States Rubber Co.,* 156 Fed. 1 (84 C. C. A. 167); *International Text Book Co. v. Pigg,* 217 U. S. 91 (18 Ann. Cas. 1103, 27 L. R. A.

(N. S.) 493, 54 L. Ed. 678, 30 Sup. Ct. Rep. 481); *Williams v. Fears,* 179 U. S. 270, (45 L. Ed. 186, 21 Sup. Ct. Rep. 128); *New York v. Knight,* 192 U. S. 21 (48 L. Ed. 325, 24 Sup. Ct. Rep. 202).)"

Petitioners admit, at page 40 of their brief, that the fact that billposting contracts are made between persons residing in different states does not transform the transaction into an interstate one, but claim that the cases which we have just discussed are not controlling because in the case at bar we have a nation-wide business involving interstate commerce. It is true that Foster and Kleiser Company conducts its business in several states and uses in its business materials which have at one time crossed state lines. It is also true that the products advertised are transported in interstate commerce. The posting of posters on billboards in the States of California, Oregon, Washington and Arizona can hardly be called a nation-wide business. Even if it were, however, that fact would be unimportant since the nature of the business is strictly local regardless of the number of states in which it is conducted. The circumstance that the products advertised are transported in interstate commerce has been disposed of as unimportant in the *Blumenstock* case (*Blumenstock Bros. Adv. Co. v. Curtis Publishing Company* (1920), 252 U. S. 436), where it appeared that the advertising contracts which the Curtis Publishing Company was charged with monopolizing and the advertising contracts of the agency with which the Curtis Publishing Company refused to do business constituted the chief method of presenting to the buying public articles sold in interstate commerce.

The Circumstance that Billposters Solicit Posting Contracts does not Place them in Interstate Commerce.

In paragraphs I and II of the complaint petitioners allege that they and Foster and Kleiser Company are engaged in the solicitation of advertising contracts (R. 4, 6.)

Advertising contracts, as we have seen, are contracts for the pasting of posters on billboards and are, therefore, local transactions. This being so, the solicitation of such contracts is also local and not interstate in character.

In distinguishing the *Ramsay* case (*Ramsay Co. v. Bill Posters Assn.* (1923), 260 U. S. 501, we pointed out that the advertising solicitors who were the plaintiffs in that action were engaged in interstate commerce because they were shipping posters in interstate commerce; and that a destruction of their business by the acts of the Bill Posters Association was a destruction of an interstate business and, therefore, a violation of the Sherman Act. Petitioners have attempted, at pages 42-46 of their brief, to bring this case within the principles of the *Ramsay* case by making it appear that the parties in the case at bar were advertising solicitors engaged in the same type of business as were the solicitors in the *Ramsay* case. In this endeavor to demonstrate that billposters are engaged in interstate commerce because they solicit advertising contracts, at pages 44-46 of their brief, petitioners quote at length from paragraph VI (R. 15-17 of the complaint), and argue that the allegations contained in that quotation show that

the parties in the case at bar were engaged in interstate commerce as advertising solicitors in the same manner as the solicitors who were plaintiffs in the *Ramsay* case.

There are at least two answers to this line of reasoning:

1. *A fair construction of the pleadings* requires the conclusion that the solicitation activities described in paragraph VI of the complaint are intended to refer to the work performed by the advertising agencies and are not intended to refer to the business of the billposters. This is borne out by an examination of paragraph V of the complaint (R. 14), where it is alleged:

> "Persons, firms and corporations who solicit outdoor advertising contracts, *and perform the activities in connection therewith, hereinafter set forth,* are referred to and called in the trade 'advertising agencies.'"

According to this quotation, persons who perform the activities *thereinafter set forth* are the advertising agencies. The billposters are not advertising agencies. Where are the activities of the agencies thereinafter set forth in the complaint? The next paragraph (i. e., paragraph VI) is the only place in the complaint where the activities referred to are thereinafter set forth, and consequently the activities described in paragraph VI are specifically identified as a description of the work performed by advertising agencies, and paragraph VI does not, as petitioners assert in their brief, describe the work performed by the billposters.

Paragraph VI also refers to the procurement of information from the association as a soliciting activity although petitioners concede in their complaint that they do not solicit such information from the association and that the agencies do. Furthermore, subdivisions (a) to (i), inclusive, of paragraph VI (R. 15-17) of the complaint, by frequent reference to dealings by the soliciting party and the plant operators make it plain that the plant operators are not the soliciting agencies referred to in that paragraph.

2. Even if the soliciting activities described in paragraph VI are sufficiently alleged to have been performed by the parties, nevertheless, they are not sufficient to show that the parties are engaged in interstate commerce. All the activities described in paragraph VI are local in character with the exception of the transportation of posters, which is described in subdivision (d) of that paragraph; but as subdivision (d) itself shows that the billposter is merely the consignee of the posters and that shipment is made by the lithographer, it is clear that the activities described in paragraph VI do not show that the billposters engaged in soliciting activities in such a manner as to make their business interstate commerce.

Petitioners have, therefore, failed to demonstrate that the business of the parties in the case at bar is identical with that of the solicitors in the *Ramsay* case (*Ramsay Co. v. Bill Posters Assn.* (1923), 260 U. S. 501, 67 L. Ed. 368, 43 S. Ct. 167). In the *Ramsay* case the solicitors were engaged in shipping posters in interstate commerce. No similar allegation appears in the case at bar, and, since the complaint considered as a whole shows that the parties did no more than solicit,

obtain, and perform agreements for posting advertisements shipped by lithographers upon instructions of the advertisers, it is manifest that their business is not interstate in character as was the business of the solicitors in the *Ramsay* case.

This Court Has Held the Billboard Business to be Essentially Local.[14a]

In *Packer Corporation v. Utah* (1932), 285 U. S. 105, 52 S. Ct. 273, 76 L. Ed. 643, this court said of the outdoor advertising business at page 112:

> "* * * Whatever may be the limitations upon the power of the State to regulate solicitation and advertisement incident to an exclusively interstate business, the commerce clause interposes no barrier to its effective control of advertising essentially local. * * *"

This was also the view of the Supreme Judicial Court of Massachusetts in *General Outdoor Advertising Company v. Department of Public Works* (1935), 193 N. E. 799, 289 Mass. 149, the court stated at page 811:

> "* * * The outdoor advertising business of the several plaintiffs is intrastate and not interstate business or commerce. * * *"

The Scope of the Sherman Act Was Not Expanded by the Wagner Act or by this Court's Decisions Under the Wagner Act.

The Sherman Act has been before this court on many occasions since the Congress enacted the Statute

14a. Petitioners have argued in their brief at pp. 48-50, that two District Courts have held the billboard business to be interstate commerce because consent decrees were entered to that effect, although there is nothing whatsoever in the Record on this subject. Obviously a consent decree is no

in 1890. In every case in which the court has been called upon to consider the scope of the Sherman Act, it has held that the Act applies only to direct, immediate and unreasonable restraints of interstate trade and commerce, and does not apply to indirect, remote and reasonable restraints of such commerce.

Over forty years ago in the case of *Addyston Pipe & Steel Co. v. U. S.* (1899), 175 U. S. 211, this court, passing upon the Sherman Act, said at page 247:

> "* * * Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the State."

In 1904 this court said in the case of *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, at page 623:

> "* * * In this day of multiplied means of intercourse between the States there is scarcely any contract which cannot in a limited or remote degree be said to affect interstate commerce. But it is *only direct interferences* with the freedom of

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authority whatsoever. In any event neither decree has any bearing on the case.

* *Bausch Mach. Tool Co. v. Aluminum Co. of America*, 2 Cir. (1935), 79 F. (2d) 217, at 226;
Ware Kramer Tobacco Co. v. American Tobacco Co. et al., 178 Fed. 117, at 125-126, C. C. E. D. N. C. (1910);
Geo. Birrell, Inc. v. Fidelity & Casualty Co. (1922), 193 Iowa 860, 188 N. W. 26, at 31-32;
15 *U. S. C. A.* 16, Oct. 15, 1914, c. 323, sec. 5, 38 Stat. 731.

such commerce that bring the case within the exclusive domain of Federal legislation."

In 1913 in the case of *U. S. v. Patten*, 226 U. S. 525, this court said, at page 542:

> *"Of course, the statute does not apply where the trade or commerce affected is purely intrastate. Neither does it apply, as this court often has held, where the trade or commerce affected is interstate, unless the effect thereon is direct, not merely indirect."*

In 1922 this court said in the case of *Federal Club v. National League*, 259 U. S. 200, at pages 208-209:

> "The business is giving exhibitions of base ball, which are purely state affairs.
>
> * * * * * * *
>
> If we are right the plaintiff's business is to be described in the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States."

In 1933 this court said, in the case of

Levering & G. Co. v. Morrin, 289 U. S. 103, at 107:

> "If thereby the shipment of steel in interstate commerce was curtailed that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts, as this court, prior to the filing of the present bill, had already held."

These decisions related to the scope of the Sherman Act and not to the constitutional power of Congress. See *Schechter Corp. v. United States*, 295 U. S. 495, where this court, after reviewing its decisions under

the Sherman Act on the subject of direct restraints, said, at page 548:

> "While these decisions related to the application of the federal statute, and *not to its constitutional validity,* the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one essential to the maintenance of our constitutional system."

Petitioners recognize in their brief, as did Judge Haney in his dissenting opinion (R. 108), that the Sherman Act applies only to direct restraints of interstate commerce; but it is claimed that the Sherman Act has been "expanded" in scope so as now to include activities which were formerly thought to have only an indirect restraint upon interstate commerce. This line of reasoning is particularly illustrated by Judge Haney's dissenting opinion, wherein he states (R. 97):

> "while the rule regarding the Congressional power over commerce has not been enlarged, the application of the exercise of the power, the anti-trust act, has been 'expanded,' as witness the Labor Board cases, cited in the majority opinion."

In contrast to this position is the opinion of the court below which holds that whatever may be the scope of the Wagner Act over local labor activities affecting interstate commerce, it is clear from the decisions of this court under the Sherman Act that the local activities described in the complaint at bar have only an indirect and remote effect upon interstate commerce and under this court's decisions are not prohibited by the Sherman Act.

No one will contend, of course, that all local activities are immune from the prohibitions of the Sherman

Act. It has been applied frequently to the conduct of employees engaged in production.

Loewe v. Lawlor, 208 U. S. 274;
Coronado Coal Co. v. United Mine Workers, 268 U. S. 295;
Bedford Cut Stone Co. v. Stone Cutters Association, 274 U. S. 37;
Local 167 v. United States, 291 U. S. 293, 297.

On the other hand, local activities not involving a direct or immediate restraint upon interstate commerce have been held to be outside the scope of the Sherman Act.

Blumenstock Bros. Adv. Agency v. Curtis Publishing Company, 252 U. S. 436;
Federal Club v. National League, 259 U. S. 200;
Moore v. New York Cotton Exchange, 270 U. S. 593;
Hopkins v. U. S., 171 U. S. 578.
Industrial Association v. United States, 268 U. S. 64;
United Mine Workers v. Coronado Coal Co., 259 U. S. 344;
United Leather Workers v. Herkert, 265 U. S. 457;
Levering & G. Co. v. Morrin, 289 U. S. 103.

The line of demarcation between those two classes of cases is an obvious one. Production and other local activities ordinarily have only an indirect and remote effect upon interstate commerce and are not within the reach of the Sherman Act. However, it is immaterial

whether the effect of an act is actually a direct or an indirect restraint upon interstate commerce if it is done for the purpose or with the intent of restraining interstate commerce, because, as soon as it appears that acts are done with a direct intent or purpose to restrain interstate commerce, the court has no alternative but to find a conspiracy (i. e., a purpose) to restrain interstate commerce in violation of the Sherman Act.

Coronado Coal Co. v. United Mine Workers, 268 U. S. 295;

Levering & G. Co. v. Morrin, 289 U. S. 103.

Recently in reviewing the decisions, this court stated an additional reason why the labor cases in the class of the first *Coronado* case, supra, and the *United Leather* case, supra, were correctly decided. The Sherman Act was not aimed at all conspiracies to restrain interstate commerce but was aimed only at those which have for their purpose and effect the market control of a commodity.[15] Labor unions which engage in local activities falling short of this purpose or effect were held to be beyond the scope of the Sherman Act.

Apex Hosiery Co. v. Leader, 310 U. S. 473, 60 S. Ct. 982, 84 L. Ed. 913.

Although the *Apex* decision clarified the Sherman Act with respect to the scope of the Sherman Act's application to labor unions, no question was involved

15. Said the court: "Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition." *Apex Hosiery Company* case, 310 U. S. at pp. 500, 501.

in that case concerning what type of restraint constitutes a direct restraint of interstate commerce. This is so because concededly the restraint there involved was a direct restraint and this court's decision held in effect that even though the restraint was direct it was not a prohibited direct restraint.

Furthermore, the principle that acts relating to local transactions ordinarily create only an indirect restraint has not been confined to the labor cases.

Blumenstock Bros. Adv. Agency v. Curtis Publishing Company, 252 U. S. 436;
Federal Club v. National League, 259 U. S. 200;
Moore v. New York Cotton Exchange, 270 U. S. 593;
Hopkins v. U. S., 171 U. S. 578.

The principle having been established by this court that the Sherman Act applies only to direct restraints and that local acts such as those described in the complaint at bar ordinarily create only an indirect restraint, what basis is there for the argument advanced by petitioners and by the dissenting judge below that the passage of the Wagner Act by Congress and this court's construction of the Wagner Act have nullified this court's former construction of the Sherman Act and expanded the scope of the Sherman Act? We need not argue that the enactment of the Wagner Act did not change the scope of the Sherman Act, for it is too obvious to require argument that the two acts are different in purpose, application and scope, and that they are unrelated, notwithstanding that they stem from the same constitutional source.

It is suggested that in upholding the constitutionality of the Wagner Act this court approved congressional regulation of local acts on a new and expanded scale. (Petitioners' Brief pp. 53-61.) It is said that the Congress, in enacting the Sherman Act, intended to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed. From this it is argued that if Congress has power to deal with local labor disputes which affect interstate commerce, it has like power and it intended to exercise it under the Sherman Act in dealing with restraints of local trade affecting interstate commerce.

The court below was not singular in rejecting this line of reasoning. (R. 93-96.) It has also been rejected by the Circuit Court of Appeals for the Third Circuit. *Apex Hosiery Co. v. Leader*, 108 F. (2d) 71, at pp. 80-81; affirmed 310 U. S. 473, 60 S. Ct. 982, 84 L. Ed. 913; although that court at one time had adopted the reasoning of petitioners. *Apex Hosiery Co. v. Leader*, 90 F. (2d) 155, at 159.[16]

We do not understand that this court expanded the constitutional power of the Congress over local acts affecting interstate commerce when it upheld the Wagner Act in the Labor Board cases. (301 U. S. 1.) The Congress perhaps had undertaken to exercise its power over interstate commerce on a broader scale

16. The recantation of the Circuit Court of Appeals for the Third Circuit appears to have been prompted by the criticism of this line of reasoning by editors of many of the leading Law Reviews. See 51 Harvard Law Review, 169; 15 New York University Law Quarterly Review, 135; 39 Columbia Law Review, 1247; and also 49 Yale Law Journal, 518, at 525-527.

than ever before attempted; but in approving that exercise of power this court relied upon and expressly approved its earlier decisions under the Sherman Act on the subject of direct and indirect restraints. *Labor Board v. Jones & Laughlin,* 301 U. S. 1, 39-40.

In the *Jones & Laughlin* case, supra, a great steel industry which was engaged in interstate commerce was held to be subject to the Wagner Act because an interruption in the great steel business by labor disputes would create a serious obstruction to the free flow of commerce. In *Labor Board v. Fainblatt,* 306 U. S. 601, a garment shop engaged in interstate commerce was held to be subject to the Wagner Act notwithstanding that the volume of garments shipped in interstate commerce by the garment company was small when compared with the total volume of such articles which were shipped in interstate commerce.

In *Santa Cruz Fruit Packing Company v. Labor Board,* 303 U. S. 453, a fruit packing company shipping a substantial portion of its pack in interstate commerce was held to be subject to the Wagner Act. In *Edison Co. v. Labor Board,* 305 U. S. 197, a public utility serving important interstate transportation and communication facilities was held to be subject to the Wagner Act because the effect of industrial conflict in the plant of the utility would likely have an immediate and catastrophic effect upon the interstate facilities serviced by the utility. In *National Labor Relations Board v. Crowe Coal Co.,* 104 F. (2d) 633 (8th Cir.) (certiorari denied—*Crowe Coal Co. v. Labor Board,* 308 U. S. 584, 60 S. Ct. 107, 84 L. Ed.

86), 64% of the total output of the coal company was used as locomotive fuel by important interstate carriers, and the consequent effect of labor disputes on interstate commerce was held to be immediate and direct.

Petitioners rely upon the foregoing Labor Board cases (petitioners' brief pages 53-61) and claim that those decisions under the Wagner Act show that the Congress now has a broader power to regulate local transactions than it heretofore had; and that this broad power must be given expression under the Sherman Act. Thus, at page 57 of their brief they refer to the "theory of the *expanded* application of *Congressional power*". But obviously the Congress had no more power under the commerce clause when it enacted the Wagner Act in 1935 than it had when it passed the Sherman Act in 1890. We think that the decisions under each of the two statutes are entirely consistent.

The Congress in enacting the Wagner Act found that labor disputes were constantly recurring sources of injury and an obstruction to the free movement of interstate commerce. (See Section 1 of the Wagner Labor Act, Act of July 5, 1935, c. 372, 49 Stat. 449-457; 29 U. S. Code, Secs. 151-166, Public No. 198, 74th Congress.) It intended to deal comprehensively with such sources of obstruction. Therefore, labor disputes in industries engaged in interstate commerce have been held by this court to be subject to congressional regulation under the Act notwithstanding that the acts regulated would, if separately considered, be essentially local in character.

In the Sherman Act the Congress did not assert any attempt to control local activities as a recurring source of danger to interstate commerce, whereas in the Wagner Act the attempt of the Congress to reach local activities was obvious, since probably most labor disputes arise in manufacture or production. While it has been said that the Congress in enacting the Sherman Act intended to exercise all the power it possessed over restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce. *Apex Hosiery Co. v. Leader,* 108 F. (2d) 71, 310 U. S. 473, 60 S. Ct. 982, 84 L. Ed. 913 at 923; *Atlantic Cleaners & Dyers v. U. S.,* 286 U. S. 427, 76 L. Ed. 1204, 52 S. Ct. 607; nevertheless it is equally true that its power does not extend to local activities having no direct effect upon interstate commerce where there is no basis for assuming that regulation of the local acts is required to prevent restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce. It has never been thought that competitive practices occurring in intrastate commerce are within the scope of the Sherman Act unless they have an effect upon commerce more direct and immediate than the mere reduction of the opportunity of persons engaged in local commerce to use and to purchase goods which are produced in other states. (*Industrial Association v. United States,* 268 U. S. 64, at p. 80.)

It is not necessary to deal with the Wagner Act cases upon the theory that they express a new and expanded concept of Congressional power over local

activities affecting interstate commerce. There was nothing in prior decisions of this court under the Sherman Act which required the court to disapprove the Congressional control of productive operations of interstate industries where it was clear that such control was necessary to protect interstate commerce from the devastating effect of a cessation of productive operations. The Sherman Act decisions stand unimpaired by anything decided or said by this court in its decisions under the Wagner Act, and in an action for treble damages under Section 7 of the Sherman Act it is still necessary for the plaintiff to state facts showing that the acts complained of directly and immediately restrained interstate commerce.

A. Monopoly of the Billboard Business Could Affect Commerce in Only Two Ways: (1) Reduce the Opportunities of Competitors to Advertise Goods Sold in Commerce; (2) Reduce the Opportunities of Competitors to Use Posters Produced in Other States.

Since the billboard business consists of pasting and painting advertisements on signboards, and since the billposter does not ship anything in interstate commerce or have anything to do with the interstate shipment of the posters which he uses in his business, what basis is there for contending that the acts complained of directly restrained interstate commerce? We pass, for the moment, the allegations of paragraph X (R. 21-26) to the effect that threats were made with respect to the shipment of lithographs in interstate commerce, for we deal with those alle-

gations separately under Point Two of our argument. The remaining acts described in the complaint are all local in character and their only immediate and direct effect is to interfere with the ability of competitors to secure locations and posting contracts—activities which are essentially local in character.

A competitor whose billboard locations are interfered with, or who is unable to secure the volume of posting contracts which he would otherwise obtain if unhampered competitive conditions prevailed, undoubtedly has less opportunity to use posters in his business than would be the case if a monopoly of the business had not occurred. This reduction of opportunity applies to all articles which the billposter uses, as for example, paint, lumber, nails, trucks and gasoline, some of which are undoubtedly produced in other states. Petitioners, however, emphasize that the posters which are used in the business are produced in other states (R. 10-11); and that billboard advertising promotes the sale of goods, wares and merchandise throughout the Pacific Coast area. (R. 11.)

The question presented is whether a monopoly of the billboard business is *per se* in violation of the Sherman Act because it reduces the opportunity of competing billposters to advertise goods transported in commerce, and because it reduces the opportunities of competing billposters to use posters which are produced in other states. To state the question otherwise, the question is whether a monopoly of the business directly restrains interstate commerce when the only

effect upon such commerce is to reduce the opportunities of competing billposters to advertise goods transported in interstate commerce and to use posters which are produced in other states.

The question of what constitutes a direct or indirect restraint of commerce is not always easy to solve. The criterion is necessarily one of degree and cannot be determined by the application of mathematical or rigid formulas. (*Santa Cruz Fruit Pack. Co. v. National Labor Relations Board*, 303 U. S. 453, at 467, 58 S. Ct. 656, 82 L. Ed. 954.) Petitioners overlook this problem and seek to reach a solution based upon an assumed mathematical formula to the effect that wherever a business or related phases thereof substantially involves interstate commerce then and in that event local acts interfering with that business automatically impose a direct restraint upon interstate commerce. (Petitioners' brief, pages 40-52.) This formula is thought by petitioners to be laid down in the Wagner Act cases. (Petitioners' brief, pages 53-61.) They ask that this court apply the so-called formula to the complaint at bar and render a decision that a monopoly of the business of pasting bills on billboards directly restrains interstate commerce in posters because the billposter uses posters produced in other states and has less opportunity to use them by reason of the acts complained of. This reasoning is not only specious—it fails to consider the real nature of the effect upon commerce resulting from the acts of respondents which are described in the complaint.

A Monopoly of the Billboard Business Does Not Produce the Same Type of Effect Upon Interstate Commerce as Was Involved in the Labor Board Cases.

In the Labor Board cases the effect of a stoppage of productive operations upon the interstate phases of the businesses involved was unquestionably direct and immediate, and this court so held. Each of the industries involved in those cases was either engaged in interstate commerce or was engaged in directly servicing important interstate transportation and communication facilities. In the complaint at bar the billboard business is shown to be essentially local in its entirety.

Therefore, there is at the outset the distinguishing fact that the billboard business is in none of its phases interstate in character, whereas in all the Labor Board cases there was a regulation of a productive phase of a business producing goods for interstate commerce or of a business directly servicing interstate commerce. Furthermore, in the Labor Board cases the local acts regulated had an immediate and direct effect upon the volume of goods shipped in interstate commerce.

In the complaint at bar, as we shall presently demonstrate, competitive practices in the billboard business have no effect whatsoever upon the interstate business of the producers of posters or upon the volume of posters which are shipped in interstate commerce.

Finally, in the Labor Board cases businesses engaged in servicing interstate facilities were held to be

subject to Congressional regulation because the operation of the interstate facilities was dependent upon the operation of the local businesses which were regulated. (*Consolidated Edison Co. v. National Labor Relations Board,* 305 U. S. 197.) We shall show that the interstate business of the advertisers who use billposting as an advertising medium is not dependent for its successful operation upon the state of competitive conditions in the billboard business. The billboard business cannot be compared with a local enterprise servicing interstate transportation and communication facilities, such as the Consolidated Edison Co.

In passing, we concede the unfair character of the acts alleged in the complaint, but the moral quality of the activities complained of is no measure of whether they fall within the scope of the Sherman Act. A sit-down strike may be deplorable conduct but it is not forbidden by the Sherman Act. (*Apex Hosiery Co. v. Leader,* 60 S. Ct. 982, 84 L. Ed. 913, at pp. 932-933.) The maintenance in our federal system of a proper distribution between state and national governments of police authority, and of remedies, private and public, for public wrongs is of far-reaching importance and an intention to disturb the balance is not likely to be imputed to Congress. The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce. (*Apex* case, supra.) *The question is not whether the acts are reprehensible but whether they directly restrain commerce among the several states.*

The Interstate Business of Advertisers Is Unaffected by Competitive Conditions in the Billboard Business.

First of all, the complaint does not show that the interstate commerce of advertisers using the billboard medium was in any way affected by the competitive conditions in the billboard business. Further, even if such a claim had been advanced, it is clear under the decisions of this court that the effect of such conditions upon the interstate commerce of the advertisers is too indirect and remote to fall within the scope of the Sherman Act. (*Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U. S. 436.) In describing the allegations of the complaint in the *Blumenstock* case, this court stated at pages 438-439 of its opinion that the Blumenstock complaint made the following claim:

> "* * * that the business of editing, publishing and distributing throughout the United States the advertising matter contained in said publications, pursuant to contracts made with its customers and advertising agencies, was interstate commerce; that such commerce is dependent for its operation and growth upon advertising facilities offered by magazines and periodicals such as those of the defendant, and that such publications constitute the chief method of presenting to the buying public the articles held out for sale; that the advertising facilities were necessary to dealers, merchants, and manufacturers in order to bring their products to the notice and attention of purchasers; * * * that for the advertising of goods and merchandise offered for sale in commerce there were no adequate facilities except those offered by the defendant and other publishers of similar magazines; * * *"

Finally, it is not shown that the interstate business of the advertisers depends upon this particular form of advertising or upon the circumstance that one billboard operator or another has the monopoly of the billboard business. As in the *Blumenstock* case, supra, the interstate commerce of the advertiser goes on unaffected by the status of competitive conditions in the billboard industry.

The Interstate Business of the Producers of Posters Is Unaffected by Monopoly of the Billboard Business.

Usually the advertiser purchases the poster from the lithographer.[17] The lithographer does not care which one of several billposters displays the posters purchased by the advertiser. The lithographer's business is therefore unaffected by the circumstance that the advertiser decides to display the posters on the plant of one billposter in preference to the plant of another. An eastern lithographer produces and sells to the advertisers the same volume of posters in interstate commerce regardless of distant competitive conditions among billboard operators displaying the posters on the Pacific Coast. The posters produced in the eastern states are shipped to the states of Washington and Oregon, regardless of whether Foster and Kleiser Company or its competitors secure the posting contracts for the display of the posters. The destination of the posters within the states of

17. Paragraph VI of the complaint alleges: "The posting of a bill or poster upon a billboard involves three different parties and two different transactions; *usually the advertiser either directly or through his agency contracts with the lithographer for the making of all the posters that the advertiser desires to use.*" (R. 17.)

Washington and Oregon may be Foster and Kleiser Company's office at Seattle or Portland rather than at the Seattle or Portland office of the petitioners; but even this slight effect upon the interstate destination of posters occurs, not because of any direct control of the alleged conspirators, but rather because local events in Washington and Oregon have reduced the opportunities of the petitioners to use posters locally.

In Any Event, a Monopoly Which Has No Greater Effect Upon Interstate Commerce Than to Reduce the Opportunities of Others Engaged in Local Operations to Use Goods Produced in Other States, Does Not Directly Restrain Interstate Commerce and Is Not Prohibited by the Sherman Act.

We have shown that the interstate transportation of the goods advertised and that the interstate business of the lithographers are entirely unaffected by the competitive conditions in the billboard industry on the Pacific Coast. However, let us assume arguendo that the complaint does appropriately allege that a monopoly of the billboard business on the Pacific Coast does have some effect upon the interstate commerce of either the producers of posters or the advertisers who use the billboard medium. Would such an effect be directly and within the scope of the Sherman Act?

The decisions of this court have already settled this question. A mere reduction of opportunity to use goods produced in other states may in turn reduce

the opportunity of the producer of those goods to ship them in interstate commerce, but the effect upon interstate commerce of this chain of events has never been considered to be direct.

In *Industrial Ass'n. v. United States*, 268 U. S. 64, this court said at page 80:

> "the building contractor, being unable to purchase the permit materials, and consequently unable to go on with the job, would have no need for plumbing supplies, with the result that the trade in them, to that extent, would be diminished. But this ignores the all important fact that there was no interference with the freedom of the outside manufacturer to sell and ship or of the local contractor to buy. *The process went no further than to take away the latter's opportunity to use, and, therefore, his incentive to purchase.* The effect upon, and interference with, interstate trade, if any, were clearly incidental, indirect and remote, * * *".

and at page 82 this court said:

> "The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

In *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U. S. 436, the Curtis Publishing Company at-

tempted to corral all advertising contracts for itself by boycotting advertising agencies which dealt with competitors except upon the Publishing Company's terms. The immediate and direct effect of such action would have been to reduce the opportunities of competitors to transact their competing publishing business. This in turn would have reduced their opportunity to maintain their respective interstate circulations, but the court thought the effect of the action was too remotely related to interstate commerce to be within the scope of the Sherman Act.

The Sixth Circuit has taken the same view in the case of *Ewing-Von Allmen Dairy Co. v. C. and C. Ice Cream Co. Inc.* (1940), 109 F. (2d) 898, where a local ice cream business was held to be beyond the scope of the Sherman Act although in the course of the business articles produced in other states were used,—in fact the bulk of the raw materials used by the defendant were produced in other states.

It is suggested that a different rule should apply because Foster and Kleiser Company conducts its business in several states and makes thousands of posting contracts (petitioners' brief, 38-39). We recognize that the law is not indifferent to considerations of degree (Cardozo J., in *Schechter Corp. v. United States,* 295 U. S. 495, at p. 554); but a business which is essentially local does not become interstate because the local events occur in different states. The number of posting contracts made by the parties does not make the effect of the acts complained of any more direct. In the *Schechter* case, supra, the

government had produced ample evidence of the substantial number of transactions involved and of their ultimate effect upon interstate commerce, but this court unanimously held that these considerations are not sufficient to give Congress jurisdiction over local acts when the ultimate effect of the acts upon commerce occurs through an indirect chain of events.

To summarize our position on this phase of the case, we repeat that the chain of events described in the complaint at bar is indirect in character. The manufacturer of posters is not prevented from producing or shipping them by distant local events in other states. The interstate movement of posters is not claimed to have been stopped or even interfered with. It is not shown to have been directly controlled. There is no claim that the volume of posters in interstate commerce was in any way affected. Any variation of the destination of the posters within the states of Washington and Oregon is but a slight effect upon the interstate movement of the posters and occurs, not because of any direct control of the alleged conspirators, but rather because local events in Washington and Oregon have reduced the opportunities of the petitioners to use posters locally. The interstate movement of the goods advertised is in no way affected by competitive conditions in the billboard industry.

Finally, if there is any effect of a monopoly of the billboard business upon the interstate commerce of the lithographer or the advertiser, then an effect produced by this chain of events is entirely indirect. To

subject to Congressional regulation local activities producing an effect so slight and indirect would lay the foundation for the Congress to regulate every local business using articles produced in other states. The authority of the Federal Government cannot be pushed to such an extreme, either under the Sherman Act or under our Constitution.

The Court Below Was Correct in its Opinion that the Complaint Shows no Intent or Purpose to Place Unlawful Restraints Upon Interstate Commerce.

The opinion of the court below states that according to the complaint the conspirators did not intend to restrain interstate commerce by the commission of the local acts described in the complaint. (R. 90, 92.) Petitioners complain that this was error because the complaint shows an actual restraint upon interstate commerce and the intent of the conspirators is therefore immaterial. (Petitioners' brief, 14-36.) The dissenting Judge below also criticized the observations of the majority on the subject of intent. (R. 106-107.) In addition, petitioners state that they have alleged intent generally and that is sufficient on demurrer. (Petitioners' brief, p. 32.)

We concede that intent may be averred generally, Rule 9(b) Federal Rules of Civil Procedure, but petitioners have not done that. They have done no more than allege that respondents intended to place unlawful restraints upon interstate commerce[18] (R. 36, 37),

18. The language of the averment is as follows:
"That the defendants, * * * have been engaged in a conspiracy and combination to place unlawful restraints upon the trade and

which is about as effective as alleging that respondents intended to violate the Sherman Act. An allegation of intent thus framed is no more than a conclusion of law. If petitioners desire to come within the principles of Rule 9(b) of the Federal Rules of Civil Procedure they might have stated what was intended in terms of fact and not in terms of conclusions. For example, if respondents had intended to destroy the interstate business of lithographers dealing with independent bill posters by destroying the billboards of independents displaying the posters produced by such lithographers, a statement of those facts would support a conclusion that the respondents intended by ther local acts to place restraints upon interstate commerce. However, there are no facts stated in the complaint at bar to support the conclusion that respondents intended to place restraints on interstate commerce by the commission of local acts.

The dissenting judge below was right when he said that if an actual direct restraint is accomplished the intent with which either interstate or intrastate acts are done is immaterial (R. 107); but the majority opinion did not say that intent is material under

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commerce in posters and lithographs between the several states of the United States * * * and in furtherance of said conspiracy and combination, did place unlawful restraints upon the trade and commerce in posters and lithographs and painted display advertising between the several states of the United States, by the commission of various and sundry acts, specific instances of which are as follows, to-wit:

"That defendants formulated, adopted and practiced the policy of interfering with all competitors of any of the defendants, and particularly the defendant Foster & Kleiser Co., for the purpose of preventing said competitors from carrying on their lawful business and the aforesaid interstate trade and commerce in outdoor advertising in competition with the defendants, and particularly in competition with the defendant Foster & Kleiser Co."

such circumstances. On the contrary, the majority pointed out that the Sherman Act may be violated notwithstanding that the ultimate objective of the conspirators is to monopolize intrastate business or commerce (R. 89-90), and the majority cited as authority the case of *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U. S. 37, 47. The observations of the court below on the subject of the ultimate intent of the conspirators were thought to be necessary only because this court had so often announced the rule that acts which *do not* directly restrain interstate commerce are nevertheless in violation of the Sherman Act if the conspirators commit them for the purpose of interfering with interstate commerce. *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.* (1927), 274 U. S. 37, 47 S. Ct. 522, 71 L. Ed. 916; *Coronado Coal Company v. United Mine Workers of America* (1925), 268 U. S. 295, 45 S. Ct. 551, 69 L. Ed. 963; *Loewe v. Lawlor* (1908), 208 U. S. 274, 28 S. Ct. 301, 52 L. Ed. 488, at p. 502. See also *Schechter Corp. v. United States* (1935), 295 U. S. 495, at p. 547, 55 S. Ct. 837, 79 L. Ed. 1570. Conspiracies to interfere with interstate commerce are in direct violation of the Sherman Act even if the acts in furtherance of the conspiracy when separately considered do not directly restrain interstate commerce.

The court below applied these principles to the complaint at bar and held accordingly that the local acts complained of did not directly restrain interstate trade or commerce. The question then remained whether the local acts were nevertheless in violation

of the Sherman Act upon the ground that they were committed with a purpose or intent to place restraint upon interstate commerce. The allegation that the acts were done for the purpose of placing restraints upon commerce (R. 36-37) is, as we have just pointed out, ineffectual because it alleges no more than a conclusion of law and must therefore be disregarded on demurrer. The specific allegations of the complaint show that the local acts were intended to spend their force locally, that there was no intent or purpose to secure results from these local acts in other states, and that any expenditure of the force of these local acts in other states was incidental, remote and unintended. Therefore, there was no basis for finding a violation of the Sherman Act by applying the principles announced by this court in the cases of *Coronado Coal Company v. United Mine Workers of America*, 268 U. S. 295; *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U. S. 37.

POINT TWO.

EVEN IF THE COMPLAINT APTLY ALLEGES AN UNLAWFUL CONSPIRACY TO CONTROL THE SHIPMENT OF POSTERS IN INTERSTATE COMMERCE, NEVERTHELESS NO FACTS ARE STATED SHOWING THAT PETITIONERS OR THEIR CUSTOMERS WERE UNABLE TO OBTAIN POSTERS, OR THAT PETITIONERS WERE IN ANY WAY DAMAGED BY ANY ACTS IN FURTHERANCE OF THE ALLEGED CONSPIRACY.

The complaint charges that respondent Foster and Kleiser Company, and its co-conspirators, entered into a scheme to monopolize the billboard business on the

Pacific Coast by preventing independents, and their customers, from obtaining posters in interstate commerce. (R. 19, 20.)

A conspiracy which seeks to accomplish its purpose by placing direct restraints upon the interstate shipment of posters is unquestionably forbidden by the Sherman Act notwithstanding that the conspirators themselves are not engaged in interstate commerce. (*Ramsay Co. v. Bill Posters Association* (1923), 260 U. S. 501, 67 L. Ed. 368, 43 S. Ct. 167.)

Further, in a civil action for damages suffered because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy but upon the injuries resulting therefrom. Therefore, we must inquire whether the complaint contains sufficient allegations of fact showing that this alleged conspiracy was made effective to the injury of petitioners.

The overt acts in furtherance of this conspiracy to prevent competitors from obtaining posters in interstate commerce are stated at pages 23 and 24 of the Record. In some respects they resemble the overt acts described in the *Ramsay* case. (*Ramsay Co. v. Bill Posters Association* (1923), 260 U. S. 501.) Certainly they constitute the closest approach which petitioners make to the statement of a cause of action against the respondents.

In the *Ramsay* case the conspirators adopted the following means for carrying out the purposes of the combination. These means are described at page 510 of the court's opinion:

"* * * By threats of withdrawal of patronage, manufacturers have been prevented from furnishing posters to independent billposters or to advertisers desiring to do business with independents except upon prohibitive terms.

"* * * Advertisers are not permitted to purchase 'stock' posters unless willing to have them displayed upon boards of members, *and independent billposters cannot purchase such matter at all.*"

It is clear from the foregoing allegations in the *Ramsay* complaint that the action of the conspirators in that case prevented lithographers from shipping posters to the plaintiffs' solicitors and that the plaintiffs were thereby prevented from carrying on their business. Furthermore, the plaintiffs in that case were solicitors who were engaged in the business of selling posters "* * * and were engaged in interstate commerce." (260 U. S. 501, at p. 509.) Therefore, a destruction of the solicitors' interstate business by the combination and monopoly described in the *Ramsay* complaint violated the Sherman Act regardless of whether the destruction was accomplished by local or interstate means.

The business of the parties in the case at bar is not an interstate business, and since a monopoly of their business does not *per se* violate the Sherman Act, it is incumbent upon the petitioners to show that respondents by threats and coercive means placed unreasonable and direct restraints upon the interstate shipment of posters to petitioners' injury. An examination of the pertinent allegations set forth in the

complaint (R. 23-24) will show, however, that petitioners have not, as did the plaintiffs in the *Ramsay* case, supra, alleged that respondents had prevented petitioners from securing posters or lithographs through the channels of interstate commerce.

Before we examine the record we refer briefly to several of the more flagrantly erroneous statements in petitioners' brief as to what the complaint alleges on this subject.

For example, petitioners state at page 6 of their brief that the association refuses to buy posters from lithographers who sell posters for display on the billboards of independents. *There is no such allegation in the complaint.* Again, at page 10 of their brief petitioners state:

> "B. The lithographers refused to furnish their posters, lithographs, and services to C. E. Stevens Company because Foster & Kleiser Co., the Bureau and the Association threatened to boycott them if they dealt with such independent, thus restricting shipments and service to the advertising public;"

There is nothing in the record to support this statement.

Similar misstatements may be found in petitioners' brief at page 17 where it is stated that advertisers were forced to deal with respondents and not with petitioners; at page 18 of their brief where it is stated that respondents directly prevented posters from being shipped to petitioners; at page 33 of their brief where petitioners state that the conspirators brought

pressure upon lithographers which resulted in the refusal of the lithographers to ship posters to petitioners; and, finally, at page 39 of their brief, where petitioners state that respondents forced lithographers and advertisers to cease sending posters and lithographs to petitioners, and to send these posters and lithographs to respondent.

We say that the foregoing statements in the brief are incorrect statements because an examination of the record (R. 23-24) will show that the complaint alleges no more than the following: That the conspirators, "by and through action of said association", threatened to refuse and did, in fact, refuse to *post* lithographs if the manufacturers of the lithographs sold or furnished lithographs for posting upon independent plants, or if the lithographers furnished samples of posters to independent plants. It is claimed that this action was taken for the purpose of coercing and intimidating, and that it did, in fact, coerce and intimidate lithographers, and that it was for the further purpose of hindering and obstructing independents, including the plaintiffs, from securing lithographs and posters and samples thereof. Under the subject of "damages" it is claimed: "* * * that thereby the said independents were obstructed and hindered in their business, and prevented from giving a full and adequate outdoor advertising service to their customers * * *."

In this connection it should be observed that the complaint does not allege that the conspirators themselves made the threats described in the complaint or

that the conspirators themselves refused to post lithographs. The association referred to is not claimed to be a conspirator because throughout the complaint, and particularly in paragraph X (R. 21-26) petitioners refer to "said association and said conspirators".

It is not alleged by whom the so-called threats were made nor to whom they were made. The threats and refusals are *indefinitely* alleged to have been done "* * * by and through action of said association * * *", although the association is not alleged to be in the business of posting, or in the business of buying or selling posters. Finally, the allegation that this action was taken for the purpose of "* * * coercing and intimidating, and it did, in fact, coerce and intimidate lithographers * * *" is a *mere conclusion* of the pleader. *Murphy v. Mitchell,* 249 Fed. 499, D. C., N. D. N. Y., 1918; 49 C. J., pp. 61-62. This is particularly true because the mere allegation of threats of refusal and actual refusal to post advertisements without showing to whom or by whom the threats were made, is too indefinite and evasive to support the general conclusion of "coercion and intimidation" which follows it. Moreover, although it is claimed that the action was taken for the purpose of preventing independent plant owners, including the plaintiff, from securing lithographs and posters, *nowhere is it alleged that petitioners or any other independent were actually prevented from securing lithographs or posters.*

True, as we have stated above, petitioners claim in their brief that paragraph X of the complaint (R.

21-26) shows that independents, including petitioners, were prevented from securing posters. However, petitioners have been *unwilling to state this in their complaint,* notwithstanding that they have had three opportunities to amend their complaint. The allegation that the independents were obstructed in their business is certainly a conclusion and as such is too indefinite and vague to justify the claim that petitioners or other independents are thereby shown to have been prevented from securing in interstate commerce the posters and lithographs which they needed for the conduct of their business.

It should be further noted that although the complaint alleges that the action of the conspirators was taken for the purpose of coercing and intimidating lithographers, and that it did, in fact, coerce and intimidate lithographers, nevertheless the complaint does not state what the lithographers were coerced or intimidated from doing. And further still, although the complaint states, (R. 23) that the action of the conspirators was taken for the purpose of preventing independent plants from securing posters and samples thereof, NOWHERE IN THE COMPLAINT IS IT STATED THAT THE INDEPENDENTS WERE UNABLE TO SECURE ANY POSTERS OR LITHOGRAPHS.

Finally, although it is alleged that the action of the conspirators was taken to prevent independents "* * * *including the plaintiff* * * *" from securing posters (R. 23), yet in *the same sentence* it is stated that the effect of the action was to obstruct independ-

ents (*and here plaintiffs are not mentioned as being included*). Certainly by referring in one portion of the sentence to independents "including the plaintiff" and by referring to the independents alone in another portion of *the same sentence,* petitioners have not alleged that they are included among the independents so obstructed. We have not overlooked the allegation in paragraph VIII (R. 19) that the term "independent" includes the appropriate plaintiff, but this allegation does not assist petitioners where, as in the case at bar, they have contrasted in the same sentence the term "independents" with the term "independents, including the plaintiff". The inclusion in the one case implies an exclusion in the other case.

Petitioners should not be permitted to get this action to trial by innuendo and general conclusions in their complaint, without specifically stating facts which are necessary to a statement of a cause of action, and which petitioners are apparently not willing to allege in a verified pleading. The manner in which the facts have been pleaded gives every indication that upon this phase of the case the petitioners are resorting to a sham pleading. If petitioners had or could have secured contracts for posting which they were prevented from performing by reason of their inability to secure posters in interstate commerce, it would have been a simple matter to have alleged this claim and to have alleged also the particular acts which were committed by respondents to prevent the petitioners from securing the posters which they needed to conduct their business. No such claim has been presented in the complaint at bar; on the contrary, peti-

tioners have resorted to mere general and sweeping charges of the obstruction of the business of independents generally, *they have not even alleged that the independents were unable to secure posters,* and, in any event, they have neither alleged a direct restraint upon the shipment of posters to themselves nor plead any facts which give rise to a logical inference that the petitioners were or could have been damaged by any direct or unreasonable restraint upon the interstate shipment of posters.

Judge Haney in his dissenting opinion in the court below (R. 109) relies upon the allegation in the complaint that "the free movement in interstate commerce of posters, lithographs, painted designs and contracts for outdoor advertising was monopolized, attempted to be monopolized, and was unreasonably restrained." That this is a conclusion of law which in no way assists petitioners in the statement of their cause of action is, we submit, too obvious to require a discussion or citation of authority.

We now refer briefly to the principles of law applicable to the indefinite and conjectural type of pleading relied upon by petitioners in the case at bar. These principles have been laid down by the courts in other cases involving substantially the same facts.

In the case of *Shurtz v. Foster & Kleiser Company et al.,* 29 F. Supp. 162 D. C. N. D. Calif. at pages 163, 164, the court in passing upon identical allegations said:

> "As pointed out by counsel for defendants, the only allegations in the complaint which come

near stating a cause of action are those alleged in paragraph XXII and XXIII, where it is alleged generally that the independents, including plaintiff, were by threats obstructed and hindered in their business. But 'this is a private controversy, not a prosecution for the common good, and overt acts must be pleaded upon which to ground the statutory liability to the plaintiff. The plaintiff must show injury to business or property. Keogh v. Chicago & Northwestern Ry. Co. et al., 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183. The fact that plaintiff is engaged in like business is not material, unless he has been injured directly, aside from injury common to all'. Ebeling v. Foster & Kleiser Co., 12 F. Supp. 489, 490.

"Testing the complaint by the law as laid down in the books, it is apparent that it does not state a claim upon which relief can be granted. See Foster & Kleiser Co. v. Special Site Sign Co., supra; Ebeling v. Foster & Kleiser Co., supra; Alexander Milburn Co. v. Union Carbide & Carbon Corp., 4 Cir., 15 F. (2d) 678, 680; Gerli v. Silk Ass'n. of America, D. C. 36 F. (2d) 959, 960."

In *Ebeling v. Foster & Kleiser Co.*, 12 F. Supp. 489, D. C., W. D., Wash., N. D., 1935, the court said at page 490:

"Conclusions or argumentative pleading tenders no issue of fact. This is a private controversy, not a prosecution for the common good, and overt acts must be pleaded upon which to ground the statutory liability to the plaintiff. The plaintiff must show injury to business or property. Keogh v. Chicago & Northwestern R. Co. et al., 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183. The fact that

plaintiff is engaged in like business is not material, unless he has been injured directly, aside from injury common to all. It is not sufficient to allege things forbidden by the Sherman Anti-Trust Law, USCA, title 15 sections 1-7, 15 note. *He must allege nature and character of the injury.* American Sea Green Slate Co. et al. v. O'Halloran et al. (C.C.A.) 229 F. 77; Noyes v. Parsons et al. (C.C.A.) 245 F. 689; Alexander Milburn Co. v. Union Carbide & Carbon Corp. et al. (C.C.A.) 15 F. (2d) 678. The wrongful act must be specific and the natural and probable effect of the combination and conduct with relation to plaintiff's business, and this *must be facts directly related to the defendants' conduct from which damages are logically and legally inferable and not merely conjecture;* and must be by the exercise of existing power, not merely that the power existed. Buckeye Powder Co. v. E. I. Dupont de Nemours Powder Co., 248 U. S. 55, 39 S. Ct. 38, 63 L. Ed. 123."

It is never enough to plead obstruction to business generally. Plaintiff must show with definiteness and certainty wherein he was injured in his business or property.

Alexander Milburn Co. v. Union Carbide & Carbon Corporation, 15 F. (2d) 678 (C.C.A. 4); at page 680:

"* * * It is very doubtful whether, without the subparagraphs, the declaration could be held a sufficient statement of a cause of action to constitute the basis of a recovery; *for it is not sufficient that the declaration be framed in the words*

of the statute, or that it allege MERE CONCLUSIONS of the pleader. *It must describe with definiteness and certainty the combination or conspiracy relied on, as well as the acts done which resulted in damage to plaintiff, and, in doing so, must set forth the substance of the agreement in restraint of trade, or the plan or scheme of the conspiracy, or the facts constituting the attempt to monopolize.* 19 R. C. L. 87; Cilley v. United Shoe Mach. Co. (C.C.), 152 F. 726; Rice v. Standard Oil Co. (C.C.), 134 F. 464."

Gerli v. Silk Ass'n of America, 36 F. (2d) 959, at 960 (Dist. Ct. S. D. New York):

"* * * *It is not enough to allege something forbidden by the Anti-Trust Laws* (15 U.S.C.A. sections 1-7, 15) and to claim general damage resulting therefrom. (American Sea Green Slate Co. v. O'Halloran (C.C.A.), 229 F. 77, 79), but *the complaint* asserting a statutory cause of action *must affirmatively show the nature and character of the injury suffered, and that it was an injury to the plaintiff's business or property within the meaning of the statute.*"

Our discussion upon this phase of the case disposes of similar allegations in paragraph X (R. 23-24) to the effect that "By and through said association or associations, advertisers were intimidated by the said association plants and the said conspirators * * *," in that the association plants and conspirators threatened to and did refuse to post posters of advertisers who made contracts with independent plants. It is not stated what the advertisers were intimidated from doing and there is no allegation showing that adver-

tisers were unable to secure posters or were unable to have them posted either by the so-called independent plants or by the so-called association plants. There is a general conclusion at the end of paragraph X (R. 26) that independents were obstructed and hindered in their business by the alleged acts of the conspirators which are set forth in paragraph X; but, for the reasons hereinabove stated, this general conclusion is too indefinite to constitute a sufficient pleading on the subject of damages.

POINT THREE.

ASSUMING ARGUENDO THAT THE SHERMAN ACT WAS VIOLATED BY RESPONDENTS' ALLEGED CONSPIRACY TO CONTROL ADVERTISING AGENCIES AND SOURCES OF NATIONAL BUSINESS, NEVERTHELESS THE COMPLAINT STATES NO FACTS SHOWING THAT PETITIONERS SUFFERED DAMAGE BY ANY ACT IN FURTHERANCE OF THE ALLEGED CONSPIRACY TO CONTROL THE SOURCES OF NATIONAL BUSINESS.

The claim is made that respondents conspired to monopolize the billboard business on the Pacific Coast, by controlling the business at its source through control of agencies and other selling organizations. (R. 20.) Much of the complaint is devoted to a recital of the acts which are supposed to have made this conspiracy effective. (R. 21-36.) Petitioners in their brief urge that these allegations show a nation-wide agreement between two powerful combines in the business and that this portion of the conspiracy was interstate in conception and execution. (Petitioners' brief, page 12.)

The complete answer to this phase of the case is that the control of the national business at its source is not in and of itself a violation of the Sherman Act because posting contracts are not interstate transactions and a monopoly thereof is not *per se* a violation of the Sherman Act.[19] Further, the complaint does not show that national posting contracts were controlled, or attempted to be controlled, at their source by placing direct restraints upon the interstate shipment of posters, as for example, by preventing advertisers from securing posters in interstate commerce. The allegations which most closely approach such a claim have been discussed already in our treatment of the charge that the conspirators by and through the association made threats and refusals (R. 23-24), and we have already shown why these allegations avail petitioners nothing.[20] The remaining allegations unsuccessfully attempt to claim that respondent Foster and Kleiser Company by virtue of its relationship with eastern sources of national business has attained a monopoly of national posting contracts.

There is no claim, other than the charge of threats and refusals heretofore disposed of,[21] that Foster and Kleiser Company achieved its dominant position in the national posting business by controlling or directly restraining the interstate movement of posters. If the interstate movement of posters was in any way affected by Foster and Kleiser Company's volume of national posting business that was an indirect and

19. See pages 15-62 of this brief.
20. See pages 62-74 of this brief.
21. See pages 62-74 of this brief.

incidental result and any such restraint of interstate commerce has not been forbidden by the Sherman Act.[22]

But let us assume arguendo that it would violate the Sherman Act for respondents to control advertising agencies and other sources of national business. Does the complaint show that respondents committed any acts in furtherance of such a plan which did in fact effect, or could have effected, control of advertising agencies and other sources of national business?

The term "advertising agencies" is not defined in the complaint, but the duties and functions of national advertising agencies are matters of common knowledge. Advertising agencies are fiduciaries of their clients' advertising appropriations and they have the obligation to allot advertising to newspapers, magazines, radio and billboards as the agencies in their good judgment see fit.

There is no claim in the complaint that the conspirators controlled any advertising agency or were in a position to direct any advertising agency where to place its billboard business. It is said, however, that practically all large advertising agencies are, and since 1918 have been, members of the National Outdoor Advertising Bureau, Inc., which is "* * * engaged in the business of aiding and assisting its stockholders and others employing its services in soliciting and executing contracts for national outdoor advertising." (R. 27.)

22. See pages 48-59 of this brief.

The agencies became members of the Bureau by virtue of a stock option agreement which provided in part that the Bureau was to be the members' sole agent for placing outdoor advertising. (R. 27-28.) Petitioners do not claim that respondents had anything to do with the preparation or execution of the membership agreement nor is it claimed that respondents had anything to do with inducing agencies to become members of the Bureau.

Petitioners have advanced the theory that agencies were compelled to become Bureau members because the conspirators paid a commission of 16⅔% to agencies which were members of the Bureau and 10% to non-Bureau members. (R. 35.) However, the petitioners have carefully omitted to allege that the same services were performed for the 10% commission as were performed where the commission of 16⅔% was paid. The allegation that a higher commission was paid to Bureau members than to non-Bureau members is of no effect whatsoever in the absence of any allegation that non-Bureau members performed the same services for 10% as were rendered by Bureau members for 16⅔%. The fact of the matter is that the 16⅔% commission was paid to agencies which rendered a complete service, including the preparation of designs, whereas the 10% commission was paid where the billposter prepared designs himself and performed other services of like character. This undoubtedly explains why petitioners have carefully omitted to claim that the same services were rendered by those who received a 10% commission as were rendered by those who received a higher commission.

The complaint next charges that the Bureau made a contract with The Thomas Cusack Company whereby the Cusack Company would execute all billboard business obtained by the Bureau. (R. 30.) It is not claimed that respondents had anything to do with this contract, and petitioners merely state in their complaint that such a contract happened to be in existence. (R. 30.)

Then it is stated that through an arrangement between the Cusack Company and Foster and Kleiser Company all national business secured through the Bureau and executed by the Cusack Company would be sublet to Foster and Kleiser Company in so far as such contracts were to be executed in the Pacific Coast area. It can hardly be contended that this agreement with the Cusack Company controlled the agencies, but we need not decide that question because the complaint shows on its face that the Cusack agreement was dissolved in 1925. (R. 33.) This action was filed on February 27, 1933, which is eight years after the dissolution of the Cusack agreement, and therefore the execution of the Cusack agreement and acts pursuant thereto are, on the face of the complaint, barred by the applicable statute of limitations, which in no event exceeds three years. *Remington's Revised Statutes of Washington,* Sec. 159 (2) and 165; *Foster & Kleiser Co. v. Special Site Sign Co.,* 9 Cir. 85 F. (2d) 742 at 750-753.

Furthermore two of the petitioners (plaintiffs in the Second and Third Counts) are alleged to have been incorporated in 1928—more than three years after the last of the acts alleged to have been committed.

On August 24, 1925, a new agreement is claimed to have been made between the Bureau and the General Outdoor Advertising Company, under which the Bureau was made the agent of the General Company to solicit contracts for national outdoor advertising to be executed upon plants owned and operated by the General Company. (R. 33.) However, General Outdoor Advertising Company did not operate any plants on the Pacific Coast (R. 33) so that that part of the contract which relates to advertising to be executed by the General Company has no bearing in this case.

The complaint goes on to allege that the Bureau's contract with the General Company also provided that the Bureau was made the agent of the General Company to solicit billboard contracts which "* * * *at the option of the Bureau* * * *" were to be executed upon plants not owned or operated by the General Company. (R. 33.) In other words, the Bureau in soliciting business for the General Company had the option to determine what plants would be used on the Pacific Coast, where the General Company did not operate.

Since it is not claimed that the conspirators had any control over the Bureau, and since the placing of Pacific Coast business was left to the option of the Bureau, it is obvious that the complaint shows on its face that business obtained by the Bureau for the General Company was under the control of the Bureau and its member agencies and was in no wise controlled by the General Company or by the conspirators.

The contract between the Bureau and the General Company had the further provision that all advertis-

ing contracts obtained by the Bureau to be performed by the General Company should be forthwith assigned by the Bureau to the General Company. (R. 33.) However, the General Company did not operate on the Pacific Coast (R. 33), and, therefore, any contracts to be performed by the General Company would not be performed on the Pacific Coast. In addition, the General Company is not named as a conspirator. Consequently, the allegation that contracts to be performed by the General Company were forthwith assigned to the General Company by the Bureau is unimportant.

Finally, it is said that in the practical operation of the contract, billboard agreements obtained by the agency members of the Bureau were assigned to the General Company, and it is also said that all the contracts to be executed on the Pacific Coast were executed by Foster and Kleiser Company. (R. 33-34.) But the complaint does not allege that the agencies were controlled by the conspirators or that the Bureau was controlled by the conspirators, and we have seen that the Bureau *at its option* could place the Pacific Coast business where it chose. How then can petitioners successfully claim that the complaint shows that Foster and Kleiser Company controlled this source of national business? The complaint shows on its face that the Bureau had the option to place the business where it chose and that in the practical operation of its option it apparently selected the plants of Foster and Kleiser Company in preference to those of competitors of Foster and Kleiser Company.

We have not overlooked the allegation that Foster and Kleiser Investment Company, a corporation

wholly owned by respondent Foster and respondent Kleiser, owned 50,000 shares of the common stock of the General Outdoor Advertising Company and that respondent Kleiser was a director of the General Company. (R. 32, 33.) It is not claimed that the General Company was a conspirator, nor does it appear from the complaint that the respondents had any control over the General Company or any agreement with it concerning the placing of business on the Pacific Coast; and, in any event, the complaint shows on its face that the Bureau and not the General Company had the option to place the billboard business where it chose on the Pacific Coast, so it matters little what relationship, if any, Foster and Kleiser Company had with the General Company.

The National Solicitors.

There are two sources of national business—the agencies and national solicitors. (R. 15.) We have shown that petitioners can claim no damage by virtue of any control by respondents over the advertising agencies, because the complaint shows on its face that respondents, in fact, obtained no control over the agencies or the national business which they developed. What about the other source of national business, the solicitor?

In 1917 the solicitors formed a company known as "Poster Advertising Co. Inc." (R. 26.) It is said that through Poster Advertising Co. Inc. and the association the conspirators prevented solicitors from placing business on independent plants. (R. 35.)

However, Poster Advertising Co. Inc. went out of existence in 1924 (R. 32), so that its activities are shown on the face of the complaint to be barred by limitations. *Remington's Revised Statutes of Washington,* Sec. 159 (2) and 165; *Foster & Kleiser Co. v. Special Site Sign Co.,* 9 Cir. 85 F. (2d) 742 at 750-753.

We next consider whether the complaint shows that petitioners can base any recovery upon the activities of the association and its licensed solicitors.

Petitioners Can Base No Recovery Upon Association Activities.

The complaint is almost unintelligible on the subject of "the association." It states that "the association" referred to is the Outdoor Advertising Association of America, Inc., a corporation (R. 21), then describes a number of predecessor associations (R. 21) and proceeds to make charges against "the association or associations" (R. 21-26) without indicating which association is meant.

We can clarify the complaint by eliminating from our consideration the various predecessor associations inasmuch as they were consolidated on March 25, 1927, into the Outdoor Advertising Association of America, Inc. Upon the face of the complaint the statute of limitations bars any of the acts of the predecessor associations prior to consolidation, because in any event the applicable statute of limitations is not in excess of three years.[23] Therefore, it is necessary to consider only the activities of the Outdoor Advertising Associa-

23. See page 78 of this brief.

tion of America, Inc., which came into existence in March, 1927, as a consolidation of its predecessor associations. (R. 21.)

It is said that membership in the association since consolidation, which we shall assume means membership in the Advertising Association of America, Inc., consists of separate display plants located in separate communities throughout the country (R. 21-22); that there is only one membership for each separate community (R. 22); that the membership is denominated a franchise (R. 22); and that the number of votes held by each member is equal to the number of membership plants operated by such member. (R. 22.)

Foster and Kleiser Company has, according to the complaint, 600 memberships and is second only to General Outdoor Advertising Company, which holds 1,000 memberships. (R. 34.) Foster and Kleiser Company has substantially all the membership plants which are operated on the Pacific Coast. (R. 22.) Respondent Kleiser was a director, and, for many years, was president of the association. (R. 34.) It is suggested that the conspirators controlled and dominated the association and the operations and functions thereof because Foster and Kleiser Company had 600 memberships therein and General Outdoor Advertising Company had 1,000 memberships therein. (R. 34-35.)

Membership in an association does not violate the federal anti-trust laws unless the purposes and activities thereof are forbidden by the anti-trust laws. We therefore next inquire whether the purposes and activities of the association are such as to be within the pro-

hibition of the Sherman Act. We also inquire whether petitioners have stated facts showing that they were damaged by the association activities. We pass the allegations that the conspirators by and through "said association", made threats and refusals which are said to have obstructed independents (R. 21-22), as we have shown elsewhere in this brief[24] that no recovery can be based upon those allegations.

The remaining association activities are claimed to have been these: the licensing of solicitors to solicit advertising exclusively for association members (R. 25); refusal of association members to execute advertising contracts which did not come through licensed solicitors of the association (R. 25); the maintenance of a statistical service for which non-members were charged $2500.00 per year, and for which members were charged a lesser sum (R. 25); and the refusal by association members to execute posting contracts in which independents were to participate. (R. 24-25.)

Again we point out that this shows no direct restraint upon the shipment of posters in interstate commerce, nor any control by the conspirators of the interstate movement of posters in commerce. The complaint, however, fails in other respects as well.

The licensing of association solicitors to secure orders from association members in no way restrains commerce in posters nor does it interfere with the activities of the so-called independents in securing posting contracts for themselves. The charge that as-

24. See pages 62-74 of this brief.

sociation members refused to post advertising unless secured by licensed solicitors is rendered nugatory by other allegations on the face of the complaint to the effect that respondent Foster and Kleiser Company obtained a large volume of its posting business through the Bureau which was not a licensed solicitor and through the advertising agencies which were not licensed solicitors; and it will be recalled also that the so-called conspirators are not shown to have had any control over the placing of advertising by the agencies or by the Bureau.[25] The complaint shows on its face, therefore, that association members did accept advertising from sources other than the so-called licensed solicitors.

Furthermore, any acts of the licensed solicitors are, on the face of the complaint, barred by the Statute of Limitations because their group (known as the Poster Advertising Company, Inc. (R. 26), was merged into the General Outdoor Advertising Company in 1924 (R. 32) and apparently played no part in the so-called conspiracy thereafter.

The maintenance of statistical data by the association is not claimed to have violated the anti-trust laws. Petitioners complain, however, because the association charged $2500.00 per year to make that service available to non-members. (R. 25.) It is claimed that this charge was prohibitive (R. 25), but the allegation that the charge was prohibitive is a mere conclusion not supported by any facts. The circumstance that asso-

25. See pages 74-87 of this brief.

ciation members obtained the service at a cheaper price is immaterial since the association members bore all the burdens and liabilities in connection with the maintenance of the service and should, in the nature of things, be entitled to obtain the service at a lesser price than that to be paid by non-members.

Although it is charged that the association plants refused to handle posting contracts in which independents were to participate (R. 24-25) *there is no claim that the conspirators refused to execute any contract in which petitioners were to participate.* Therefore, petitioners have failed to show any injury and damage to themselves resulting from these alleged activities of the association.

In conclusion upon this point it is clear that none of the alleged acts of the association involved any direct control of the interstate movement of posters by the alleged conspirators. No control over the agencies is shown. No control over the Bureau is shown. The placing of agency business in territories not serviced by the General Outdoor Advertising Company is shown upon the face of the complaint to have been at the option of the Bureau over which the conspirators had no control. Finally, *to the extent that the allegations regarding the association are definite or intelligible, the petitioners are not shown to have been unable to secure posters nor are they shown to have lost any contracts by virtue of the so-called association activities.*

Therefore, from all that appears in the complaint, and it is the fact, the placing of Pacific Coast business

with Foster and Kleiser was directed by the agencies and the advertisers whom they represented. There is no showing in the complaint that either the advertisers or their agencies surrendered any control in the placing of contracts to respondents or their unnamed associates in the alleged conspiracy.

POINT FOUR.

DAMAGES CAUSED BY LOCAL PREDATORY ACTS ARE NOT RECOVERABLE BECAUSE SUCH ACTS WERE IN NO WAY RELATED TO THE ALLEGED CONSPIRACY TO RESTRAIN TRADE IN POSTERS.

The complaint recites a variety of so-called predatory acts, all local in character and having for their object the interference with billboard locations of competitors. (R. 36-44.) Petitioners claim that these activities interfered with the execution of their existing contracts and rendered the procuring of new contracts partially or wholly impossible. (R. 41-42.) This is an allegation of injury to petitioners themselves, and is the only allegation of fact in the complaint showing that petitioners themselves were injured by reason of the activities of respondents which are described in the complaint.

These various predatory acts are alleged to have been committed in furtherance of a conspiracy to place unlawful restraints upon interstate trade and commerce in posters. (R. 37.)

We have already discussed the point that the billboard business is local in character and that a monopoly thereof does not *per se* directly restrain

interstate commerce in posters.[26] In that discussion we show that the effect of local transactions upon commerce is indirect and remote and that the Sherman Act is not violated merely by obtaining control of the billboard business which is essentially local in character.

What we said in that discussion applies with equal force here. Interference with advertising sites locally does not prevent any bill poster from obtaining posters in interstate commerce. True, it takes away a bill poster's opportunity to use, and his incentive to purchase, posters but it in no way interferes with the freedom of the lithographer to sell and ship, or of the billposter to buy posters. It has no effect upon the interstate business of the advertiser or the lithographer. If there is any effect upon interstate commerce, it is, under the decisions of this court, clearly incidental, indirect and remote.

Industrial Ass'n of S. F. v. U. S. (1925), 268 U. S. 64, at p. 80;

United Leather Workers v. Herkert (1924), 265 U. S. 457;

United Mine Workers v. Coronado Coal Co. (1922), 259 U. S. 344;

Levering & G. Co. v. Morrin (1933), 289 U. S. 103.

Petitioners argue, however, that these local acts are part and parcel of a conspiracy to restrain commerce in posters and that therefore damages sustained by such local acts are recoverable as having been caused

26. See pages 15-62 of this brief.

by acts in furtherance of the conspiracy, and that this is so regardless of whether the local acts themselves directly restrain interstate commerce. This theory is wholly untenable.

Damages, in order to be recoverable under the Sherman Act, must be caused by acts having some reasonable relation to the furtherance of a violation of the Sherman Act. Where that violation consists of a conspiracy to restrain commerce in posters, the acts which caused the damage must be in furtherance of such a conspiracy or must have a reasonable relation to the furtherance of such conspiracy. *It is not sufficient to allege a prohibited conspiracy to restrain interstate commerce in posters and then to plead acts which, if accomplished, would not result in furtherance of the conspiracy.* By the device used by petitioners it would be a simple matter to get a case to trial under the Sherman Act where, as here, the only acts committed are local in character, simply by alleging that they were committed pursuant to a conspiracy to restrain interstate commerce.

In the case at bar the only acts which have caused damage to petitioners are local acts which could not possibly have been in furtherance of the alleged conspiracy to place restraints upon commerce in posters, because they are wholly unrelated to the furtherance of such a conspiracy, and damages caused thereby are not recoverable under the Sherman Act.

Foster & Kleiser Co. v. Special Site Sign Co., 85 F. (2d) 742, at 754 (certiorari denied, 299 U. S. 613).

As the court below quite correctly stated (R. 90):

> "* * * By the device of alleging a conspiracy to restrain interstate trade in posters and lithographs without alleging that this conspiracy was effective and worked to the damage of appellants, they cannot recover damages arising from the alleged conspiracy to prevent the acquisition and use of billboards and to obtain a monopoly of advertising contracts, activities intrastate in character, when it is clear that the purpose of the conspiracy as a whole is a monopoly of intrastate business."

POINT FIVE.

IN ANY EVENT THE CIRCUIT COURT OF APPEALS WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF THE SECOND AND THIRD COUNTS OF THE COMPLAINT.

This point is not raised in the petition for certiorari. Further, it was not expressly decided by the Circuit Court of Appeals because the decision of the Circuit Court of Appeals upon the major issue of the application of the Sherman Act made it unnecessary to determine the point. However, if it should be held by this court that the decision of the Circuit Court of Appeals, in so far as it involves the construction of the Sherman Act, should be reversed then it will be necessary to determine whether the second and third counts state a cause of action.

While we assume that this court would refer these questions back to the Circuit Court of Appeals for its decision we herewith submit a brief outline of what is involved so that it will not be overlooked that we rely

upon this point in addition to the points previously discussed.

In the first count of the complaint it is alleged (R. 3):

> "That plaintiff alleges that the C. E. Stevens Company is the parent company, and that C. E. Stevens Tacoma Company and C. E. Stevens Company of Oregon are subsidiaries of the parent company, functioning principally as branch offices of the parent company, * * *"

By this allegation, which is incorporated by reference in each of the second and third counts, the plaintiffs therein have shown themselves to be agents of C. E. Stevens Company, the plaintiff in the first count.

The term "branch offices" can have but one meaning. A branch office is commonly understood to be a local arm of the main office. Compare *Remington's Revised Statutes of Washington,* Sec. 3221, defining the term "branch banks" as follows:

> "The term 'branch bank', where used in this act, means any office of deposit or discount maintained by any bank or trust company, domestic or otherwise, other than its principal place of business, regardless of whether it be in the same city or locality."

The pleader meant to convey the same meaning, that is to say, a place of doing business other than the principal place of business, for in paragraph III it is alleged with reference to the business of the respondent Foster and Kleiser Company (R. 8):

> "* * * said defendant Foster & Kleiser Co., has its *principal place* of business in the City of San Francisco, and *branch offices* at Seattle and Tacoma, * * *"

The term "branch office" has been judicially determined to mean a place "where the corporation conducts its general business in the same way that it carries on its busines at its principal office". See *Ft. Smith Lumber Co. v. Shackleford,* 171 S. W. 99, 115 Ark. 272 (1914). *Webster's New International Dictionary* defines a "branch" as a "local subordinate office".

It is also beyond dispute that those who are employed to operate the branch offices are agents. The circumstance that C. E. Stevens Tacoma Company and C. E. Stevens Company of Oregon are corporations does not, of course, alter their agency status. In conducting branch offices for the C. E. Stevens Company they are fully as much its agents as if those branch offices were operated by natural persons.

The question therefore presented is whether plaintiffs in the second and third counts have any right to join with their principal, C. E. Stevens Company, in prosecuting this action, as no damage is alleged except as to the business and property of C. E. Stevens Company, for whom they are alleged to have acted as agents, and for those damages C. E. Stevens Company is itself suing in the first count.

No Facts are Stated Supporting any Claim that Plaintiffs in Second and Third Counts were Damaged in their Separate Corporate Capacity.

It may be conceded, of course, that an agent may recover damages to his own, as distinguished from his principal's, property. Thus, if an agent were using his own automobile in the course of his principal's business, the agent would be entitled to recover damages for any wrongful injury to that automobile by a third person.

See 3 *C. J. S.*, p. 138:

> "The general rule is that an action will lie in favor of an agent against a third person for any injury or trespass committed by such third person against the agent *personally* while acting in the course of his employment."

In the case at bar, however, the complaint affirmatively shows that plaintiffs in the second and third counts were conducting the business of the parent company—and no business of their own. The only injury claimed is loss of business and profits. Since the business was the parent company's, the profits lost would have accrued to it, and not to the agent companies which were conducting its branch offices. No facts are stated which could support a claim that the agent companies which operated the branches sustained any personal loss.

The Cause of Action Cannot be Split Between the Parent Company and its Agents, the Two Subsidiaries.

That this condition which we now urge is well founded can be demonstrated, we think, if the court will look forward to the time of trial. Assume that the principal defendant, Foster and Kleiser Company, answers this complaint, putting in issue (a) the facts alleged by C. E. Stevens Company, the parent company, claimed by it to amount to a monopolization of interstate commerce in posters and lithographs; and (b) the claims made by C. E. Stevens Company in respect of the amount of damage it claims to have sustained in consequence of the conspiracy alleged. Assume that upon the issues thus made a trial is had and the stage is reached when the court is confronted with the task of instructing the jury: First, as to what facts will create liability in favor of C. E. Stevens Company and against Foster and Kleiser Company, the principal defendant; and second, the rules by which the jury must assess the amount of the damage in favor of C. E. Stevens Company and against Foster and Kleiser Company if the jury finds that liability exists. Obviously in such circumstances the court must instruct the jury to return *one verdict* representing all the *damage sustained by the parent company,* which is the owner of the entire business claimed to have been injuriously affected by the alleged wrongful acts of the respondents. It is elementary, of course, that *there can be no splitting of causes of action. Either the parent company can make one entire recovery or it can make none at all.* The

court having so instructed, as it must, that if any recovery at all is allowed it must be allowed in one lump sum in favor of the parent company whose business was damaged, by what rule can the court then go forward and instruct the jury that it can additionally return a verdict for some amount in favor of one agent (C. E. Stevens Tacoma Company) and for some other amount in favor of the other agent (C. E. Stevens Company of Oregon) when no injury to them personally is shown?

It seems too plain for argument that at the close of all the evidence, if any liability at all is established under the allegations of this compaint, it must be a liability in favor of C. E. Stevens Company, the parent corporation, and against the principal defendant, Foster and Kleiser Company. Full indemnity having thus been made by a verdict returned on the first cause of action, how can it be possible for the jury to then return verdicts on the second and third causes of action in favor of the two subsidiaries which, as stated in the complaint, never functioned except as branch offices or agents of the party recovering the verdict on the first cause of action?

Remington's Revised Statutes of Washington, Sec. 179, provides:

> "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided by law."

And the following section, 180, states the exceptions as being executors, administrators, guardians, trustees

of an express trust, etc. *There is no provision to the effect that an agent may maintain a suit to recover damages suffered by his principal.*

The new Rules of Civil Practice for the District Courts of the United States contain identical provisions in Rule 17 (a), which reads:

> "Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; * * *."

The rule thus stated is, of course, but a restatement of a well settled rule of practice that has always been observed.

It is well settled that it is the principal and not the agent who must sue for damages sustained by the principal.

See:

Denman v. Richardson, 284 Fed. 592 (1921) (D. C. W. D. Washington S. D.);

Chatfield v. Clark, 51 S. E. 743 (1905), 123 Ga. 867;

Galveston, H. & S. A. Ry. Co. v. Stockton, 38 S. W. 647 (1897) (Tex. Civ. App.).

Hence, assuming for the purposes of argument that C. E. Stevens Company, the parent company, has stated a cause of action against Foster and Kleiser

Company, it is entirely clear the respondents cannot be held liable to the parent company for all of the damages sustained by it and additionally held liable for some portion of the same damages sustained by the parent company through its two subsidiaries acting as its agents. The second and third counts were properly dismissed.

CONCLUSION.

Upon the grounds and for the reason urged in this brief, it is now submitted that the judgment of the court below must be affirmed.

Dated, San Francisco, California,
November 8, 1940.

Respectfully submitted,

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Attorneys for Respondents, Foster and Kleiser Company (a corporation), George W. Kleiser, Restop Realty Company (a corporation), and Gerald O'Neil.

P 1

SUPREME COURT OF THE UNITED STATES.

No. 41.—OCTOBER TERM, 1940.

C. E. Stevens Company, C. E. Stevens Tacoma Company and C. E. Stevens Company of Oregon, Petitioners,
vs.
Foster & Kleiser Co., George W. Kleiser, P. Foster, et al.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 9, 1940.]

Mr. Justice ROBERTS delivered the opinion of the Court.

In this case the petitioners filed a complaint[1] in the District Court for ~~Northern California~~ Western Washington, under § 7 of the Sherman Act,[2] for triple damages for alleged violation by the respondents of §§ 1 and 2 of the Act.[3] The respondents demurred to the amended complaint for failure to state a cause of action. The District Court treated the demurrer as a motion to dismiss and dismissed the complaint. The Circuit Court of Appeals affirmed the judgment.[4]

The question presented is whether the complaint alleges damage to the petitioners consequent upon a conspiracy to create a monopoly in the business of bill posting in the Pacific Coast region and to accomplish that monopoly by restraining interstate commerce in the transportation of posters.

The relevant allegations of the complaint may be summarized.

The petitioner C. E. Stevens Company is engaged in the business of outdoor advertising, which is the business of procuring locations

[1] The suit was brought by the C. E. Stevens Company and two subsidiaries. The complaint is in three counts, the first setting forth the claim of the parent company, and each of the others the claim of one of the subsidiaries, against the respondents. Save as to the locale of the plaintiffs' business, and the amount of damages demanded, the counts are substantially alike. We shall refer to the first count as the complaint. The District Court did not pass on the question of the propriety of the joinder of the several causes of action, which was raised by the demurrer, and we express no opinion upon it.

[2] Act of Oct. 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U. S. C. A. § 15.

[3] Act of July 2, 1890, c. 647, §§ 1 and 2, 26 Stat. 209; 15 U. S. C. §§ 1 and 2.

[4] 109 F. (2d) 764.

and erecting structures thereon for the posting of bills and the painting of signs. Its business is conducted in Washington and other states. More specifically, the petitioner's activities are the soliciting, entering into, and execution of contracts for poster service for the display of posters, painted bulletins, and wall displays. These contracts are secured from advertisers, their representatives, and advertising agencies located throughout the United States and constitute agreements whereby the parties are to ship posters, lithographs, designs, stencils, etc., interstate with the purpose that the posters or lithographs shall be placed upon billboards and the other material used for painting signs on locations controlled by the bill posting company. Foster & Kleiser Co., one of the respondents, is engaged in the same business in the Pacific Coast states and elsewhere. The other respondents are connected with and controlled by Foster & Kleiser Co. or its subsidiary, Restop Realty Co., the latter being in the business of owning, holding, and leasing property for outdoor advertising sites on the Pacific Coast.

The usual routine of the business is that the advertiser, directly or through an agency, contracts with a lithographer for making posters. The advertiser, either personally or through an agency, contracts with a bill posting company in the desired locality for the placing of the posters. The advertiser then forwards the posters to the bill poster or orders the lithographer to forward them. Foster & Kleiser Co. is operating under numerous contracts thus made.

Foster & Kleiser Co. formulated and entered into a plan, scheme, and conspiracy with others for the purpose of monopolizing all branches of the outdoor advertising business in the Pacific Coast area and preventing petitioner and other independents, so-called, from engaging in that business and securing and executing contracts therefor and from securing posters for use therein. The purpose of the conspirators was to prevent lithographers from supplying posters to independents, including petitioner, or to advertisers who were customers of petitioner and to prevent independents from securing adequate sites for the display of posters.

The bill asserts that there is an association of paint plant[5] operators and poster plant operators, known as "Outdoor Advertising Association of America, Inc.", of which the owners of separate

[5] A plant is a group of sign locations owned or controlled by one bill poster in one city or community.

plants located in separate cities are members. There is one membership for each municipality. Voting rights are according to the number of separate plants owned and operated by each voting member. Foster & Kleiser Co. has some six hundred plants with concomitant voting rights. By virtue of its voice in the management of the association, and pursuant to the conspiracy, it caused the association to threaten to refuse, and to refuse, to post lithographs if the manufacturers thereof sold or furnished them for posting by independent plants or furnished samples of posters to independent plants, with the aim and effect of coercing and intimidating the lithographers so as to prevent and hamper the petitioner and other competitors of the association's plants, and of the respondents, from securing samples or lithographs. Actual obstruction and hindrance of the independents, including the petitioner, resulted. Pursuant to the conspiracy, the association and the conspirators threatened to refuse, and have refused, to post posters and lithographs for advertisers if they patronized or made contracts with independent plants. In addition, the conspirators refused to execute any portion of national contracts for outdoor advertising if any part of the work had been executed, or was to be executed, by an independent plant. The movement in interstate commerce of posters, lithographs, and designs for outdoor advertising was thus attempted to be monopolized, was monopolized, and was unreasonably restrained by the respondents.

Other allegations are made with respect to agreements brought about by the Foster & Kleiser Co. and other bill posting concerns to exclude the petitioner and other independents from participation in the national business of advertising. It is also alleged that the respondents resorted to various other illegal and unfair acts and means in the petitioner's locality in an effort to prevent petitioner from obtaining sites for posting lithographs and displaying advertising signs, as part of the same general conspiracy and for the same ultimate purpose. We do not further set out these allegations because enough has been said to indicate the question on which the case turns.

The respondents conceded in the court below, and here, that the complaint charges a conspiracy in restraint of interstate commerce, within the purview of the Sherman Act, in view of the decision in *Ramsay Co.* v. *Associated Bill Posters Association*, 260 U. S. 501.

The court below, however, agreed with the respondents that the complaint fails to allege that the conspiracy, so far as it affected

interstate commerce, was effective to injure petitioner, since there was no allegation that respondents' conduct prevented the petitioner from obtaining or receiving any posters. It thought the allegations of damage to petitioner's business were directed to the local acts of the respondents rather than to any restraint of interstate commerce in posters; and, as purely local activities were the gravamen of the complaint, no violation of the Sherman Act was sufficiently charged. This, upon the principle that local activities pursued without intent to hinder or restrain interstate commerce, although they indirectly affect it, cannot flow from or sustain a finding of conspiracy to interfere with or restrain such commerce.

The petitioner urges that the complaint charges a general conspiracy to monopolize the bill posting business on the Pacific Coast and, as one of the means of such monopoly, to restrain interstate commerce in posters contributing to the resulting injury of the petitioner. It insists that the court below was wrong in construing the complaint as charging a monopoly of local business not intended to affect interstate commerce.

We hold that the complaint alleges a conspiracy in violation of §§ 1 and 2 of the Sherman Act. The object of it is to monopolize or to restrain trade in the bill posting business on the Pacific Coast, and in aid of that purpose, to restrain interstate commerce in posters; and the complaint sufficiently alleges that such monopoly and restraint inflicted damage upon the petitioner.

As we have said, the complaint alleges that the petitioner solicits contracts for poster advertising as does the respondent, Foster & Kleiser Co. The petitioner is thus in competition with Foster & Kleiser Co. in the effort to obtain contracts which call for the interstate shipment of posters for their execution. The complaint adequately charges a conspiracy to restrain the transportation of posters in interstate commerce, in aid of the attempted monopoly. It also charges other means and acts, local in character, with the same aim. The conspiracy, with its effect on interstate commerce, is alleged to have caused the petitioner great expense and loss of profits; to have restrained and prevented petitioner from establishing a business in San Francisco, "all to the great injury and damage of plaintiff". The pleading further alleges that the respondents' acts were injurious to the petitioner, excluded petitioner from fair competition, and charges that because of petitioner's inability to compete with respondents, petitioner "has been damaged in that